

ENTERED

F 2302

San Francisco Law Library

436 CITY HALL


No. 162084

EXTRACT FROM RULES

Rule 1a. Books and other legal material may be borrowed from the San Francisco Law Library for use within the City and County of San Francisco, for the periods of time and on the conditions hereinafter provided, by the judges of all courts situated within the City and County, by Municipal, State and Federal officers, and any member of the State Bar in good standing and practicing law in the City and County of San Francisco. Each book or other item so borrowed shall be returned within five days or such shorter period as the Librarian shall require for books of special character, including books constantly in use, or of unusual value. The Librarian may, in his discretion, grant such renewals and extensions of time for the return of books as he may deem proper under the particular circumstances and to the best interests of the Library and its patrons. Books shall not be borrowed or withdrawn from the Library by the general public or by law students except in unusual cases of extenuating circumstances and within the discretion of the Librarian.

Rule 2a. No book or other item shall be removed or withdrawn from the Library by anyone for any purpose without first giving written receipt in such form as shall be prescribed and furnished for the purpose, failure of which shall be ground for suspension or denial of the privilege of the Library.

Rule 5a. No book or other material in the Library shall have the leaves folded down, or be marked, dog-eared, or otherwise soiled, defaced or injured, and any person violating this provision shall be liable for a sum not exceeding treble the cost of replacement of the book or other material so treated and may be denied the further privilege of the Library.



Digitized by the Internet Archive
in 2010 with funding from
Public.Resource.Org and Law.Gov



W. 3026

No. 15448

United States
Court of Appeals
For the Ninth Circuit

JOAN DE VIGIL,

Appellant,

vs.

GENERAL ACCIDENT FIRE & LIFE ASSUR-
ANCE CORPORATION, LIMITED, a British
Corporation,

Appellee.

Transcript of Record

Appeal from the United States District Court
for the District of Hawaii

FILED

APR - 5 1957

PAUL P. O'BRIEN, CLERK



No. 15448

**United States
Court of Appeals**
For the Ninth Circuit

JOAN DE VIGIL,

Appellant,

vs.

GENERAL ACCIDENT FIRE & LIFE ASSUR-
ANCE CORPORATION, LIMITED, a British
Corporation,

Appellee.

Transcript of Record

**Appeal from the United States District Court
for the District of Hawaii**



INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

PAGE

Answer	13
Attorneys, Names and Addresses of	1
Bond on Appeal	27
Certificate of Clerk	28
Motion for Summary Judgment	20
Notice of Appeal	26
Petition for Removal	3
Exhibit A—Complaint	7
Removal Bond	5
Pretrial Order	15
Ruling on Motion for Summary Judgment	21
Statement of Points on Which Appellant Intends to Rely	31
Summary Judgment	25



NAMES AND ADDRESSES OF ATTORNEYS

For the Plaintiff, Joan De Vigil,

HYMAN M. GREENSTEIN, ESQ.,
400 So. Beretania St.,
Honolulu, T. H.

For the Defendant, General Accident Fire & Life
Assurance Corporation, Limited,

MILLARD D. WHITE, ESQ.,
313 McCandless Building,
Honolulu, T. H.



In the United States District Court for the
District of Hawaii

Civil No. 1432

JOAN DE VIGIL,

Plaintiff,

vs.

GENERAL ACCIDENT FIRE & LIFE ASSUR-
ANCE CORPORATION, LIMITED, a British
Corporation,

Defendant.

PETITION FOR REMOVAL

The petition of General Accident Fire and Life Assurance Corporation, Limited respectfully shows:

1. That an action has been brought by plaintiff, above named, against defendant, above named, in the Circuit Court of the First Judicial Circuit of the Territory of Hawaii as Civil No. 839 and is now pending therein;

2. That said action is a civil action of which the District Courts have original jurisdiction and that the amount in controversy exceeds the sum of Three Thousand and no/100 Dollars (\$3,000.00) exclusive of costs and interest;

3. That a certified copy of the said Complaint and Summons (with attachments) is attached hereto and marked "Exhibit A" and by reference made a part hereof;

4. That the Petitioner herein appears specially and solely for the purpose of removing said cause to the United States District Court in and for the District of Hawaii upon the ground and for the reason that the above action involves a conflict which is wholly between a citizen of the Territory of Hawaii and one of a foreign jurisdiction, in that Joan De Vigil, in the words of her Complaint herein, was, at the time of commencement of said suit, and still is a resident of the City and County of Honolulu, Territory of Hawaii, temporarily sojourning in the State of Colorado, and that the Defendant is a foreign corporation, organized under the laws of the United Kingdom of Great Britain and domiciled in Perth, Scotland, United Kingdom;

5. That defendant, General Accident Fire and Life Assurance Corporation, Limited, was served with a copy of Summons on April 26, 1955, and that twenty (20) days have not elapsed since said service;

6. That your Petitioner files herewith a good and sufficient bond made and conditioned as the law directs, and that payment will be made of costs and disbursements incurred by reasons of these removal proceedings if the Court shall determine that the action was not removable or was improperly removed thereto.

Wherefore, Petitioner prays that the said case be removed from the said Circuit Court of the Territory of Hawaii into this Court for trial and deter-

mination, and thereupon proceed as a cause originally commenced herein.

Dated at Honolulu, Hawaii, this 3rd day of May, 1955.

GENERAL ACCIDENT FIRE AND LIFE ASSURANCE CORPORATION, LIMITED,

By /s/ MILLARD D. WHITE,
Its Attorney.

Duly verified.

[Title of District Court and Cause.]

REMOVAL BOND

Know All Men by These Presents:

That General Accident Fire and Life Assurance Corporation, Limited, as principal, by Millard D. White, and Fidelity and Deposit Company of Maryland, as surety, are held and firmly bound to Joan De Vigil, plaintiff in the above-entitled cause, her heirs, executors, administrators and assigns in the sum of Five Hundred and No/100 (\$500.00) Dollars lawful money of the United States for the payment of which, well and truly to be made, we, and each of us, bind ourselves, our successors and assigns, jointly and severally by these presents.

Whereas, defendant General Accident Fire and Life Assurance Corporation, Limited, has applied

by petition to the United States District Court for the District of Hawaii for the removal of a certain case pending in the Circuit Court of the First Judicial Circuit of the Territory of Hawaii wherein Joan De Vigil is plaintiff, and General Accident Fire and Life Assurance Corporation, Limited is defendant, to the United States District Court for further procedure on the ground set forth in said petition:

Now, Therefore, the condition of the obligation is such that if Petitioner in said removal action, defendant above named, shall pay all costs and disbursements incurred by reason of the removal proceeding if it should be determined that the cause was not removable or was improperly removed to the District Court then this obligation shall be void; otherwise it shall remain in full force and effect.

In Witness Whereof, we, the principal and surety, have caused our hands and seals to be affixed hereto this 3rd day of May, 1955.

GENERAL ACCIDENT FIRE AND LIFE ASSURANCE CORPORATION, LIMITED,

By /s/ MILLARD D. WHITE,
Its Attorney, Principal.

[Seal] FIDELITY AND DEPOSIT
COMPANY OF MARYLAND;

By /s/ ALBERTA CUNHA,
Its Attorney in Fact, Surety.

Duly verified.

EXHIBIT A

In the Circuit Court of the First Judicial Circuit
Territory of Hawaii

Civil No. 839

JOAN DE VIGIL,

Plaintiff,

vs.

GENERAL ACCIDENT FIRE & LIFE ASSUR-
ANCE CORPORATION, LIMITED, a British
Corporation,

Defendant.

COMPLAINT

To the Honorable, the Presiding Judge of the
Above-Entitled Court:

Comes now Joan De Vigil, plaintiff above named,
by her attorney Hyman M. Greenstein, and com-
plaining of the defendant above named, for cause of
action alleges as follows:

I.

That plaintiff was at all times mentioned herein
and still is a resident of the City and County of
Honolulu, Territory of Hawaii, and is presently
temporarily sojourning in the State of Colorado.

II.

That defendant was at all times mentioned herein
and still is a foreign corporation, organized under
the laws of the United Kingdom of Great Britain

and domiciled in Perth, Scotland, United Kingdom, and was at all times mentioned herein and still is an insurance carrier duly authorized to transact business in and to issue policies of automobile liability insurance in the Territory of Hawaii, through its general agent, National Mortgage and Finance Company, Limited, a Hawaiian corporation.

III.

That this action is based upon the provisions of Sec. 7421(f), Revised Laws of Hawaii, 1945, as amended by Act 393, Session Laws of Hawaii, 1949, and known as the Motor Vehicle Safety Responsibility Act.

IV.

That on or about the 11th day of October, 1953, in Honolulu aforesaid, plaintiff suffered certain severe, painful, disfiguring and disabling personal injuries as a direct result of an automobile accident caused by the negligent operation by one Fred A. Meyers, of Honolulu aforesaid, of a certain Chevrolet automobile, then belonging to and being driven by the said Fred A. Meyers.

V.

That at the time and place that plaintiff received said injuries, as set forth above, there was in existence and in full force and effect a certain policy of automobile liability insurance, the same being policy No. 1 A 2643289 issued by the defendant, General Accident Fire & Life Assurance Corporation, Limited, whereby said defendant agreed for a valuable consideration to pay, within the limits of liability in

said policy, which limits are to the plaintiff unknown at this time, any final judgment which should be rendered against the said Fred A. Meyers, arising out of his negligent operation of said Chevrolet automobile.

VI.

That thereafter, on the 19th day of October, 1953, the defendant, by and through its agent, the National Mortgage and Finance Company, Limited, a Hawaiian corporation, pursuant to the provisions of Section 7405(c) of the Session Laws of Hawaii, 1949, filed in the office of the Chief of Police of the City and County of Honolulu, Territory of Hawaii, a notice in writing containing the following statement:

“Date of accident: October 11, 1953.

“Place of accident: 1671 Kalakaua Ave., Honolulu, T. H.

“The company signatory hereto gives notice that its policy numbered 1 A 2643289 issued to Fred A. Meyers, c/o Island Hotel, 351 Seaside Avenue, Honolulu, T. H. is an automobile liability policy approved by the commissioner of insurance or an automobile liability policy acceptable to him, affording limits of \$5000/\$10,000 bodily injury and \$1000 property damage, which policy was in effect on the date of the above-described accident.”

Said statement was signed by the defendant as the insurance company and by the National Mortgage & Finance Company, Limited, as general agent and by

one Arthur Brown, as the authorized representative of the above-named corporations.

VII.

That on January 7, 1954, a second statement, identical in every respect to the statement described in Paragraph VI, above, excepting that the address of the said Fred A. Meyers was shown as "c/o Pacific Roofing Co., Honolulu" was filed by the defendant in the same place and manner as described in Paragraph VI, above.

VIII.

That on October 30, 1953, the defendant received actual notice in writing from the said Fred A. Meyers that the plaintiff was asserting a claim against him as a result of said accident.

IX.

That on April 26, 1954, the plaintiff filed an action at law against the said Fred A. Meyers in the Circuit Court of the First Judicial Circuit of the Territory of Hawaii, said action being identified as Law No. 23532, wherein the plaintiff claimed damages for personal injuries suffered by her as a result of that certain automobile accident referred to in Paragraphs IV, VI and VIII, above.

X.

That on or about May 4, 1954, the plaintiff having been unable to find the said Fred A. Meyers to serve him with process in the above-described action, the plaintiff, through her attorney, requested the defendant herein through its agent, one Kaname

Shimazu, a claims adjuster employed by the defendant's general agent, National Mortgage & Finance Co., Ltd., to accept service of process in said action on behalf of said Fred A. Meyers, or to aid the plaintiff in locating the said Fred A. Meyers in order that he could be served with process. Both of the foregoing requests were refused by the defendant herein.

XI.

That thereafter, on May 13, 1954, the said Fred A. Meyers was personally served with process in the said action, in due form of law, in Honolulu aforesaid, and on June 14, 1954, no answer or other pleadings having been filed by the said Fred A. Meyers or on his behalf, an order of default was duly entered in the said action.

XII.

That thereafter, on June 25, 1954, the plaintiff, through her attorney, informed the defendant, through its authorized representative, one Arthur Brown, a claims adjuster, that the order of default mentioned above had been entered and inquired of him if he wished to make an offer to settle the plaintiff's claim, but the defendant, through the said Arthur Brown, absolutely refused to make any offer or take any action whatsoever toward settlement of plaintiff's claim.

XIII.

That thereafter, on November 12, 1954, the plaintiff proved her damages by competent and credible evidence in open court in the said action and on

November 16, 1954, a judgment in favor of the plaintiff against the said Fred A. Meyers in the total sum of \$7,568.95 was duly entered in the said action, Law No. 23532, which judgment is final and has not been appealed, and no part of which has been satisfied.

XIV.

That thereafter, on November 20, 1954, the plaintiff, through her attorney, presented a certified copy of said judgment to the defendant herein and made demand in writing of said defendant for immediate payment of the full amount of said judgment or for such portion thereof as was provided for under the terms of defendant's policy of automobile liability insurance covering the judgment debtor, Fred A. Meyers, thereupon the defendant herein refused and failed to satisfy said judgment, or any part thereof, or to make any payment thereunder to the plaintiff whatsoever, and still refuses and has failed so to do.

Wherefore, Plaintiff demands judgment against the defendant herein for the sum of \$7,568.95, plus interest, costs and a reasonable attorney's fee or statutory attorney's commissions as provided by law.

Dated at Honolulu, Hawaii, this 25th day of April, 1955.

[Seal] /s/ HYMAN M. GREENSTEIN,
Attorney for Plaintiff.

[Endorsed]: Filed April 25, 1955.

[Endorsed]: Filed May 4, 1955.

[Title of District Court and Cause.]

ANSWER

Defendant above named, in answer to the complaint filed in the above-entitled court and cause, says:

First Defense

The complaint fails to state a claim against the defendant upon which relief can be granted.

Second Defense

Defendant admits the allegations contained in paragraphs I, II, III and IV of the complaint.

Answering paragraph V of plaintiff's complaint, defendant admits the existence of automobile liability policy No. 1 A 2643289, but denies the remaining allegations of said paragraph and respectfully alleges that in truth and in fact said automobile liability policy was subject to certain conditions subsequent which the said Fred A. Meyers failed to perform.

Defendant admits the material allegations of paragraphs VI, VII, VIII, IX, X, XI, XII, XIII and XIV of the complaint.

Third Defense

Defendant alleges that, by said automobile liability policy No. 1 A 2643289 as issued by the defendant, and accepted by the insured, it was provided that compliance with following provision was and is a condition of liability:

“Condition 7. Notice of Claim or Suit. If claim is made or suit is brought against the insured, the insured shall immediately forward to the company every demand, notice, summons or other process received by him or his representative.”

That Fred A. Meyers, the insured named in said automobile liability policy No. 1 A 2643289, issued as aforesaid, was, on May 13, 1954, personally served with process in connection with an action filed by plaintiff against said Fred A. Meyers in the Circuit Court of the First Judicial Circuit of the Territory of Hawaii, therein identified as Law No. 23532, and wherein plaintiff claimed damages resulting from operation of the insured automobile; that said Fred A. Meyers failed to forward the insurance carrier a copy of the summons and process served on him in said suit as required by the provision of said policy, and on June 14, 1954, permitted an order of default to be entered against him therein; that by virtue of said breach of said contract by him as said insured, plaintiff was and is barred from recovering on said policy or by reason of said policy against this defendant.

Fourth Defense

That the provisions of Section 7421(f) Revised Laws of Hawaii, 1945, as amended by Act 393, Session Laws of Hawaii, 1949, and known as the Motor Vehicle Responsibility Act, seeks to deprive the defendant of its property without due process of law and denies the defendant the equal protection of the laws in violation of its rights under the Fourteenth

Amendment of the Constitution of the United States.

Fifth Defense

The automobile liability policy herein sued on is not a policy which had been executed in accordance with the provisions of Chapter 138, Revised Laws of Hawaii, 1945, as amended by Act 393, Session Laws of Hawaii, 1949, and known as the Motor Vehicle Responsibility Act.

Wherefore, defendant prays judgment that it be dismissed with its costs herein incurred.

Dated: Honolulu, Hawaii, June 3rd, 1955.

/s/ M. D. WHITE,
Attorney for Defendant.

Receipt of copy acknowledged.

[Endorsed]: Filed June 3, 1955.

[Title of District Court and Cause.]

PRETRIAL ORDER

Nature of Proceedings

This is an action against the insurer under an automobile liability insurance policy to recover of the insurer the amount of an unpaid judgment rendered in favor of the plaintiff and against the driver of the vehicle insured by defendant.

Admitted Facts

The following facts are admitted and require no proof:

1. That the plaintiff was, at the time of the commencement of this action, a citizen and resident of the Territory of Hawaii; that the defendant was a foreign corporation, organized under the laws of the United Kingdom of Great Britain; that the amount in controversy exceeds the sum of \$3,000.00 exclusive of costs and interest; and there is a diversity of citizenship between plaintiff and defendant.

2. That on or about October 11, 1953, in Honolulu, plaintiff was injured in an accident as a result of the negligent operation by one Fred A. Meyers of his motor vehicle.

3. That at the time of said injury, there was in full force and effect a certain policy of automobile liability insurance, issued by the defendant wherein defendant agreed to pay within the limits of said policy any final judgment which should be rendered against said Fred A. Meyers arising out of his negligent operation of his motor vehicle.

4. That at the time of said accident, there was in full force and effect a law of the Territory of Hawaii, being entitled "Motor Vehicle Safety Responsibility Act," Act 393, Session Laws of the Territory of Hawaii, 1949, Chapter 140, Revised Laws of Hawaii, 1945, amended, which among other things requires the driver of a motor vehicle, following being involved in a motor vehicle accident, to give

proof of financial responsibility or establish that at the time of such accident he had in effect an automobile liability policy with respect to the motor vehicle involved in such accident. (Sec. 7404-7406 RLH 1945 amended.)

5. That on October 19, 1953, the defendant, by and through its agents, the National Mortgage and Finance Company, Limited, a Hawaiian corporation, pursuant to the provisions of Section 7405 (c) of the Session Laws of Hawaii, 1949, (Motor Vehicle Safety Responsibility Act), filed in the office of the Chief of Police of the City and County of Honolulu, Territory of Hawaii, a notice in writing containing the following statement:

“Date of accident: October 11, 1953.

“Place of accident: 1671 Kalakaua Ave., Honolulu, T. H.

“The company signatory hereto gives notice that its policy numbered 1 A 2643289 issued to Fred A. Meyers, c/o Island Hotel, 351 Seaside Avenue, Honolulu, T. H., is an automobile liability policy approved by the commissioner of insurance or an automobile liability policy acceptable to him, affording limits of \$5000/\$10,000 bodily injury and \$1000 property damage, which policy was in effect on the date of the above-described accident.”

6. That the insured, Meyers, complied with Condition 6 of the automobile liability policy, involved herein, relating to the giving of notice of accident.

7. That on April 26, 1954, plaintiff filed an action against said Meyers, in the Circuit Court of the

First Judicial Circuit of the Territory of Hawaii, said action being numbered Law No. 23532 wherein plaintiff claimed damages for personal injuries sustained in said aforementioned accident.

8. That plaintiff, at first was unable to locate said Meyers, and on May 4, 1954, requested defendant to accept service of process on behalf of said Meyers. That defendant refused.

9. That on May 13, 1954, said Meyers was personally served with summons.

10. That Meyers failed to comply with Condition 7 of said automobile liability policy in failing to forward any suit papers to the defendant.

11. That no answer or other pleadings were filed by Meyers or on his behalf, and that on June 14, 1954, an order of default was entered against him in said action.

12. That on November 12, 1954, plaintiff was awarded a judgment against Meyers in the total sum of \$7,568.95; that said judgment is a final judgment; and that no part of same has been paid.

13. That on November 20, 1954, demand for payment of said judgment was made upon defendant. That defendant has refused to pay the same or any part thereof.

14. That Section 7421(f)(1) of said Motor Vehicle Safety Responsibility Act provides:

“(1) The liability of the insurance carrier with respect to the insurance required by this part shall

become absolute whenever injury or damage covered by said motor vehicle liability policy occurs; said policy may not be canceled or annulled as to such liability by any agreement between the insurance carrier and the insured after the occurrence of the injury or damage; no statement made by the insured or on his behalf and no violation of said policy shall defeat or void said policy;"

Plaintiff's & Defendant's Contentions of Fact

1. There are no issues of fact herein—the only question is one of law.

Plaintiff's Contentions of Law

1. That under the Hawaii Motor Vehicle Safety Responsibility Act the liability of the defendant became absolute upon plaintiff obtaining a final judgment against the assured.

Defendant's Contentions of Law

1. Defendant's theory is that the policy carried by Meyers was not a motor vehicle liability policy as contemplated by the Act, hence, the insurer is entitled to plead its policy defenses.

Plaintiff's Counter Contention of Law

1. That by filing in the office of the Chief of Police a notice of insurance coverage, in compliance with the Act, the defendant waived any claim to the effect that this policy was not executed in accordance with the Act.

Point of Law at Issue

1. Under the admitted facts of this case, is the defendant liable?

Dated at Honolulu, Hawaii, this 14th day of June, 1956.

/s/ HYMAN M. GREENSTEIN,
Attorney for Plaintiff.

Approved:

/s/ M. D. WHITE,
Attorney for Defendant.

It Is Hereby Ordered that the foregoing constitutes the pretrial order in the above-entitled cause.

/s/ LON WIIG,
U. S. District Judge.

[Endorsed]: Filed June 21, 1956.

[Title of District Court and Cause.]

MOTION FOR SUMMARY JUDGMENT
BY DEFENDANT

Defendant moves the Court as follows:

That it enter, pursuant to Rule 56 of the Federal Rules of Civil Procedure, a summary judgment in defendant's favor dismissing the action, on the ground that there is no genuine issue as to any material fact and that defendant is entitled to a judgment as a matter of law;

This motion is based upon the records and files herein, the pretrial order filed June 21, 1956, and the authorities submitted by plaintiff and defendant.

Dated: Honolulu, T. H., this 29th day of October, 1956.

/s/ M. D. WHITE,
Attorney for Defendant.

[Endorsed]: Filed October 29, 1956.

[Title of District Court and Cause.]

RULING ON MOTION FOR SUMMARY JUDGMENT

Defendant insurance company moves for a summary judgment in plaintiff's action, which is based on a judgment recovered against one Fred A. Meyers, an assured under one of defendant's automobile liability policies. The motion is predicated upon a stipulated fact "that Meyers failed to comply with Condition 7 of said automobile liability policy in failing to forward any suit papers to the defendant."

Plaintiff, while a passenger in Meyers' automobile, suffered injuries in an automobile accident in Honolulu, Hawaii, on October 11, 1953. Later that month, Meyers notified the defendant in writing that plaintiff was asserting a claim against him as a result of the accident. Plaintiff subsequently filed an action for damages against Meyers in the Circuit

Court of the Territory of Hawaii and recovered judgment against Meyers for a substantial sum of money. Although the defendant had knowledge of this action, Meyers failed to forward the complaint and summons to the defendant as required by his policy.

First, plaintiff urges that Meyers' failure to perform a condition in the insurance policy is not a defense because § 7421(f), Revised Laws of Hawaii, 1945, as amended, declares that in any policy embraced by that section the insurance company's responsibility is absolute. Section 7421(f) applies to "every motor vehicle liability policy," which is defined as "an owner's or an operator's policy of liability insurance, certified as provided in section 7419 or section 7420 as proof of financial responsibility * * *" The Hawaii financial responsibility law¹ is not applicable to the policy in question because Meyers was not required by that statute, or any other statute of Hawaii, to obtain an automobile liability policy. In common with other citizens, Meyers was entitled to one serious accident before the financial responsibility law restricted his use of the public highways.

Secondly, plaintiff contends that Meyers' insurance policy was "required" under the financial responsibility law because § 7405 authorizes the Chief of Police to suspend an operator's license after his first accident unless the operator comes

¹Chapter 140, Revised Laws of Hawaii, as amended.

within certain exceptions. One exception is to have in effect at the time of the accident an automobile liability policy covering the vehicle involved in the accident. Such coverage is purely voluntary on the owner's part. The fact that it serves to avoid suspension of the operator's license in the event of an accident does not mean that it was required under the statute.

Since the Supreme Court of Hawaii has not passed on a similar factual situation, it would appear that the following general rule is applicable:

“While, in the absence of express statutory provision to the contrary, failure to give notice or to forward process to the insurer, or other lack of co-operation by the insured, constitutes a good defense to an action by an injured member of the public against the insurer under a voluntary liability insurance policy or bond which stipulates that the insured shall thus co-operate, a different rule prevails where the policy or bond was issued in compliance with a compulsory liability insurance statute, in such case the defense of lack of co-operation being ineffective, except where the particular accident or person was not within the coverage of the statute or ordinance. This rule develops from the fact that the purpose of such a statute or ordinance is to benefit or protect injured members of the public * * *

“The general rule has been held applicable, whether the policy was procured in compliance with a general compulsory liability insurance law or fi-

nancial responsibility act * * * (31 A.L.R. 2d 646, 647).”

Plaintiff's reliance on *Watson vs. Royal Indemnity Co.*, 56 F. 2d 409 (S.D. Ala. 1932), which contained language supporting her contentions, is unauthoritative because on appeal the trial court was reversed. In *Royal Indemnity Co. vs. Watson*, 61 F. 2d 614, 616 (5th Cir. 1932), the court said:

“We are of opinion that the admitted failure to comply with the condition of the policy, requiring an assured promptly to forward or cause to be forwarded to the insurance company or its designated agent a copy of the summons and complaint served upon him by appellee, precludes any recovery in this case, unless it be shown that appellant waived that condition * * * It is held by the overwhelming weight of authority that an assured who has breached this important condition cannot recover unless there has been a waiver, and that the rights of a third person can rise no higher than, but are dependent upon, the rights of the assured.”

The record in this case fails to support plaintiff's claim that performance of the “forwarding of all suit papers” condition was waived. Although the defendant insurance company had written notice of a potential claim against Meyers and was aware of the fact that plaintiff had filed an action against him, the company was not required to defend its assured because of his failure to comply with Condition 7 of the policy.

The motion for summary judgment is granted.

Dated at Honolulu, Hawaii, this 28th day of December, 1956.

/s/ LON WIIG,

United States District Judge.

[Endorsed]: Filed December 28, 1956.

In the United States District Court
for the District of Hawaii

Civil No. 1432

JOAN DE VIGIL,

Plaintiff,

vs.

GENERAL ACCIDENT FIRE & LIFE ASSUR-
ANCE CORPORATION, LIMITED, a British
Corporation,

Defendant.

SUMMARY JUDGMENT

Whereas, a motion for summary judgment by defendant came on to be heard the 13th day of November, 1956, and the Court having considered the same and filed herein its ruling thereon,

It Is Hereby Ordered, Adjudged and Decreed that judgment in favor of defendant and against the plaintiff be entered dismissing the within action.

Dated: Honolulu, T. H., this 8th day of January, 1957.

/s/ LON WIIG,

United States District Judge.

[Endorsed]: Filed and entered January 9, 1957.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that Joan De Vigil, plaintiff above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the Summary Judgment filed and entered the 9th day of January, 1957, in favor of defendant and against the plaintiff dismissing the within action.

Dated at Honolulu, T. H., this 16th day of January, 1957.

HYMAN M. GREENSTEIN, and
ROBERT A. FRANKLIN,

Attorneys for Appellant;

By /s/ HYMAN M. GREENSTEIN.

Receipt of copy acknowledged.

[Endorsed]: Filed January 17, 1957.

[Title of District Court and Cause.]

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT
OF HAWAII IN CIVIL No. 1432

BOND FOR COSTS ON APPEAL

Know All Men by These Presents:

That Joan De Vigil, as principal, and Continental Casualty Company, as surety, are held and firmly bound unto General Accident Fire & Life Assurance Corporation, Limited, a British Corporation, in the full and just sum of Two Hundred and Fifty (\$250.00) Dollars, to be paid to the said General Accident Fire & Life Assurance Corporation, Limited, its successors and assigns; to which payment, well and truly to be made, we bind ourselves, our successors, assigns, heirs, executors and administrators, jointly and severally by these presents.

Whereas, on January 9, 1957, in an action depending in the United States District Court for the District of Hawaii, between Joan De Vigil as plaintiff and General Accident Fire & Life Assurance Corporation, Limited, as defendant, a Summary Judgment was rendered and entered against the said plaintiff, and the said plaintiff having filed a notice of appeal from such summary judgment to the United States Court of Appeals for the Ninth Circuit;

Now, Therefore, the condition of this obligation is such, that if the said Joan De Vigil shall prosecute her appeal to effect and shall pay costs if the appeal

is dismissed or the judgment affirmed, or such costs as the said Court of Appeals may award against the said Joan De Vigil if the judgment is modified, then this obligation to be void; otherwise to remain in full force and effect.

In Witness Whereof, the above bounden Principal and Surety have hereunto set their hands and seals this 8th day of February, 1957.

JOAN DE VIGIL,
Plaintiff,

By HYMAN M. GREENSTEIN;

By /s/ HYMAN M. GREENSTEIN,
Her Attorney, Principal.

[Seal] CONTINENTAL CASUALTY
COMPANY,

By /s/ MASAYUKI TOKIOKA,
Its Attorney-in-Fact.

By /s/ MORITO TSUGAWA,
Its Attorney-in-Fact, Surety.

[Endorsed]: Filed February 8, 1957.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

United States of America,
District of Hawaii—ss.

I, William F. Thompson, Jr., Clerk of the United States District Court for the District of Hawaii, do

hereby certify that the foregoing record on appeal in the above-entitled cause, numbered from Pages 1 to 41, consists of a statement of the names and addresses of the attorneys of record and of the various original pleadings as hereinbelow listed and indicated:

Petition for Removal, Removal Bond and Copies of Process and Pleadings. (Certified copy of Complaint and Summons.)

Answer.

Pretrial Order.

Motion for Summary Judgment by Defendant and Notice of Motion.

Ruling on Motion for Summary Judgment.

Summary Judgment.

Notice of Appeal.

Bond for Costs on Appeal.

Designation of Contents of Record on Appeal.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court, this 14th day of February, 1957.

[Seal] /s/ WM. F. THOMPSON, JR.,
Clerk, U. S. District Court,
District of Hawaii.

[Endorsed]: No. 15448. United States Court of Appeals for the Ninth Circuit. Joan De Vigil, Appellant, vs. General Accident Fire & Life Assurance Corp., Limited, a British Corporation, Appellee. Transcript of Record. Appeal from the United States District Court for the District of Hawaii.

Filed February 18, 1957.

Docketed: February 25, 1957.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 15448

JOAN DE VIGIL,

Appellant,

vs.

GENERAL ACCIDENT FIRE & LIFE ASSUR-
ANCE CORPORATION, LIMITED, a British
Corporation,

Appellee.

STATEMENT OF POINTS ON WHICH
APPELLANT INTENDS TO RELY

The points upon which the appellant intends to rely on this appeal are as follows:

1. The court erred in granting the Motion for Summary Judgment.

2. The court erred in ruling that the Hawaii Financial Responsibility Law, Chapter 140, Revised Laws of Hawaii, 1945, as amended, was not applicable to the insurance policy in question in this case.

3. The court erred in ruling that the appellee was not required to defend its assured because of his failure to comply with Condition 7 of the policy.

4. The court erred in failing to consider appellant's claim that appellee waived any claim to the effect that its policy was not executed in accordance

with the Hawaii Financial Responsibility Law by filing with the Chief of Police a notice of insurance coverage.

Dated at Honolulu, Territory of Hawaii, this 7th day of February, 1957.

/s/ HYMAN M. GREENSTEIN,
Attorney for Appellant.

[Endorsed]: Filed February 18, 1957.

No. 15451

In the United States Court of Appeals
for the Ninth Circuit

KAY MARTIN SUMMERS, ALSO KNOWN AS KAY MARTIN
AND KATHERINE SEAMON, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

BRIEF FOR THE UNITED STATES

CHARLES K. RICE,
Assistant Attorney General.

JOSEPH M. HOWARD,
JOHN J. McGARVEY,
Attorneys,
Department of Justice,
Washington 25, D. C.

BEN PETERSON,
United States Attorney.

FILED

MAY 31 1957

PAUL P. O'BRIEN, CLERK

INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented.....	2
Constitutional provisions, Statutes and Rules involved.....	3
Statement	6
Argument:	
I. Appellant was not deprived of her rights to the effective assistance of counsel and due process of law as a consequence of the jeopardy assessment.	
II. The trial court did not abuse its discretion in denying, in part, appellant's motion for a bill of particulars	24
III. Appellant was not prejudiced by the manner in which the jury was selected.....	34
IV. The court did not err in ruling on the admissibility of evidence	35
V. The court did not restrict the cross examination of prosecution witnesses, nor did it comment on the importance and weight of the evidence to the prejudice of appellant	38
VI. There was no error in the instructions, much less plain error of the character which this Court should notice even though no exception was taken to the charge	39
Conclusion	42

CITATIONS

Cases:

<i>Blackwell v. United States</i> , decided May 5, 1957.....	34
<i>Dyer v. Gallagher</i> , 203 F. 2d 477.....	32
<i>Frazier v. United States</i> , 335 U. S. 497.....	35
<i>Harvey v. Early</i> , 66 F. Supp. 761, affirmed, 160 F. 2d 836	32
<i>Helvering v. Mitchell</i> , 303 U. S. 391.....	32
<i>Herzog v. United States</i> , 235 F. 2d 664, certiorari denied, 352 U. S. 844.....	39

Cases—Continued

	Page
<i>Holland v. United States</i> , 348 U. S. 121.....	28, 29
<i>Lurding v. United States</i> , 179 F. 2d 419.....	42
<i>Maxfield v. United States</i> , 152 F. 2d 593, certiorari denied, 327 U. S. 794.....	34
<i>Norwitt v. United States</i> , 195 F. 2d 127.....	41
<i>O'Connor v. United States</i> , 203 F. 2d 301.....	26, 33
<i>Phillips v. Commissioner</i> , 283 U. S. 589.....	32
<i>Pointer v. United States</i> , 151 U. S. 396.....	35
<i>Remmer v. United States</i> , 205 F. 2d 277, judgment vacated and remanded, 347 U.S. 227, affirmed, 222 F. 2d 720, reversed, 350 U. S. 377.....	34
<i>Smith v. Baldi</i> , 344 U. S. 561, affirming, 192 F. 2d 540..	28
<i>Smith v. United States</i> , 348 U. S. 147	36
<i>Spies v. United States</i> , 317 U. S. 492.....	28, 32, 41, 42
<i>United States v. Allied Stevedoring Corp.</i> , 138 F. Supp. 555	31
<i>United States v. Brodson</i> , 241 F. 2d 107, reversing, 136 F. Supp. 158, petition for certiorari pending....	28, 29, 30, 31
<i>United States v. Caserta</i> , 199 F. 2d 905.....	34
<i>United States v. Chapman</i> , 168 F. 2d 997.....	34
<i>Wong Tai v. United States</i> , 273 U.S. 77.....	34

Statutes:

18 U.S.C., Sec. 1001	1, 4, 33
28 U.S.C., Sec. 1864	4, 35

Internal Revenue Code of 1939:

Sec. 145 (26 U.S.C. 1952 ed., Sec. 145)	1, 4, 5
Sec. 273 (26 U.S.C. 1952 ed., Sec. 273)	5, 32

Miscellaneous:

Constitution of the United States:

Fifth Amendment	9, 31
Six Amendment	9, 31

Federal Rules of Criminal Procedure:

Rule 30	5, 39
Rule 52	6, 39

**In the United States Court of Appeals
for the Ninth Circuit**

No. 15451

KAY MARTIN SUMMERS, ALSO KNOWN AS KAY MARTIN
AND KATHERINE SEAMON, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

BRIEF FOR THE UNITED STATES

OPINION BELOW

The judgment of the District Court was rendered without an opinion.

JURISDICTION

On September 6, 1956, a four count indictment was returned against the appellant in the United States District Court for the District of Idaho, charging, in the first three counts, wilful attempted evasion of income tax for the years 1950, 1951 and 1952, in violation of Section 145(b) of the Internal Revenue Code of 1939; the fourth count charged that appellant knowingly and wilfully made a false statement to Treasury agents in a matter within the jurisdiction of that Department, in violation of 18 U.S.C., Section 1001. (R.

6-9) ¹ Jurisdiction was conferred on the District Court by 18 U.S.C., Section 3231. After a jury trial, appellant was found guilty as charged (R. 88.) She was sentenced to imprisonment for nine months and fined \$1,000 on each count, the prison sentences to run concurrently. Sentence was imposed and judgment entered on November 21, 1956. (R. 89-90.) Notice of Appeal was filed on November 30, 1956. (R. 97-98.) The jurisdiction of this Court is invoked under 28 U. S. C., Section 1291.

QUESTIONS PRESENTED

1. Whether appellant's conviction was obtained in violation of her rights under the Constitution to the effective assistance of counsel and due process of law as a result of the jeopardy assessment and tax liens.

2. Whether the court abused its discretion in denying in part appellant's motion for a bill of particulars as to the income tax evasion counts.

3. Whether the jury was properly impaneled.

4. Whether the court erred (a) in admitting subject to connection testimony and exhibits relating to appellant's net worth and expenditures without first requiring the prosecution to establish an opening net worth, and (b) in admitting the testimony of a Treasury agent as to the fact and negative results of an investigation conducted by the witness and other agents under his direction.

5. Whether the court unduly restricted cross examination of prosecution witnesses and made com-

¹ References preceded by "R." are to the Transcript of Record; references preceded by "Tr." are to the Transcript of proceedings upon trial.

ments on the weight and importance of the evidence to the prejudice of appellant.

6. Whether such phrases in the instructions as “if you believe” and “it is sufficient” constituted plain error in the context used.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

Constitution of the United States:

Fifth Amendment

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Sixth Amendment

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

18 U. S. C.:

SEC. 1001. Statements or entries generally

Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statement or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than \$10,000 or imprisoned not more than five years, or both. June 25, 1948, c. 645, 62 Stat. 749.

28 U. S. C.:

SEC. 1864. Manner of drawing; jury commissioners and their compensation.

The names of grand and petit jurors shall be publicly drawn from a box containing the names of not less than three hundred qualified persons at the time of each drawing.

* * * * *

Internal Revenue Code of 1939:

SEC. 145. PENALTIES.

* * * * *

(b) *Failure to Collect and Pay Over Tax, or Attempt to Defeat or Evade Tax.*—Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for

and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than \$10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

* * * * *

(26 U.S.C. 1952 ed., Sec. 145.)

SEC. 273. JEOPARDY ASSESSMENTS.

(a) *Authority for Making.* If the Commissioner believes that the assessment or collection of a deficiency will be jeopardized by delay, he shall immediately assess such deficiency (together with all interest, additional amounts, or additions to the Tax provided for by law) and notice and demand shall be made by the collector for the payment thereof.

* * * * *

(26 U.S.C. 1952 ed., Sec. 273.)

Federal Rules of Criminal Procedure:

RULE 30. INSTRUCTIONS.

At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. At the same time copies of such re-

quests shall be furnished to adverse parties. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury.

RULE 52. HARMLESS ERROR AND PLAIN ERROR.

(a) *Harmless Error.* Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.

(b) *Plain Error.* Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

STATEMENT

Appellant's statement of the case (Br. 2-18) is inadequate and incomplete in many respects. Accordingly, the Government submits the following summary of the evidence and record.

The first three counts of the indictment, charging wilful attempts to evade tax by the filing of false and fraudulent returns, alleged that appellant's reported and correct income and tax liability for the years in question were as follows (R. 8-9):

Year	Income		Tax Liability	
	Reported	Correct	Reported	Correct
1950.....	\$2,585	\$14,090	\$92	\$2,832
1951.....	2,248	12,997	44	2,772
1952.....	536	27,814	00	9,710

The fourth count charged that on or about July 22, 1953, appellant knowingly and willfully made a false statement of a material fact to agents of the Internal Revenue Service, "to wit, that the only currency that she had on hand at that time was \$130.00, plus certain currency in her safety deposit box". (R. 8-9.)

On May 13, 1954, over two years prior to the return of the indictment, a jeopardy assessment was made and tax liens were filed against the appellant for income taxes and additions thereto for fraud, plus interest, for the years 1947 to 1952, inclusive. (R. 11, Tr. 577, Deft. Ex. 76.) The jeopardy assessment was made in accordance with the provisions of Section 273 of the Internal Revenue Code of 1939. On June 9, 1954, the Commissioner sent a notice of deficiency to appellant, setting forth the deficiencies and additions thereto for fraud for the years 1947 through 1952 totaling \$80,603. (Deft. Ex. 76.) On June 25, 1954, appellant filed a petition with the Tax Court seeking a redetermination of the deficiencies ² (R. 10-12.) Trial of the civil case was continued pending trial of these criminal charges.

PRE TRIAL MOTIONS

Appellant filed a motion for bill of particulars (R. 18-22), accompanied by her affidavit (R. 25-26) and an affidavit of one of her counsel, Walter N. Oros (R. 23-24), requesting the Government to disclose, with respect to the first three counts, the method used in determining the alleged unreported income and the source of such income and, if the net worth method was employed, the appellant's alleged net worth at the be-

² The petition was prepared by the counsel who have represented appellant throughout these criminal proceedings.

ginning and end of each year involved, and with respect to count four, whether the alleged false statement was made orally or in writing, to whom made and where, and in what respects the statement was false. The court granted the motion in part as to the first three counts, ordering the Government to disclose the method to be employed in proving the alleged unreported income, and in full as to count four. (R. 29-39.) The Government filed a bill of particulars and supplement thereto (R. 31-32) in which it stated that the net worth method of proof would be employed, and that the false statement was made orally to two agents of the Internal Revenue Service, at the office of the Internal Revenue Service in Boise, Idaho.

On September 14, 1956, appellant moved the court for an order directing the Government to "release", in effect to pay over to her, at least \$7,500 of her funds which, pursuant to the jeopardy assessment, had been levied upon by the Internal Revenue Service, applied against the assessment and covered into the Treasury, "in order that [appellant] may properly conduct her defense." (R. 10.) In an affidavit accompanying the motion (R. 11-12), appellant alleged in substance that as a result of the jeopardy assessment and accompanying tax liens and levies, she was without funds to pay "attorney's fees, accountant's fees, witness fees, and incidental expenses" in connection with the defense of this action. After a hearing, the court denied the motion without prejudice (R. 14, 28) on the grounds that it lacked jurisdiction to enter such an order (R. 52). On October 16, 1956,³ appellant renewed the motion

³ On September 26, 1956, appellant had filed a similar motion in the Tax Court which was denied on October 10, 1956. (R. 53.)

(R. 51.) which was accompanied by an affidavit of one of her counsel, Oros (R. 52-55), which recited, among other things, that "in order to sustain [appellant's] defense, it will be necessary that she have and employ the services of accountants," and that, as a result of the jeopardy assessment and accompanying liens and levies, she was without funds to secure such services. After hearing arguments of counsel, the court again denied the motion (R. 63) whereupon appellant, on the same day October 16, 1956, filed a motion to dismiss each count of the indictment (R. 65-66) and a motion for continuance (R. 70), trial having previously been set for October 22, 1956 (R. 14).

The motion to dismiss the indictment was based on the following grounds (R. 65):

1. That the Internal Revenue Code of 1939 and Amendments thereto, do not authorize the institution of a criminal proceeding during the pendency of a jeopardy assessment and liens.

2. That the institution of a criminal procedure as set out in the indictment in this case during the pendency of a jeopardy assessment and impending liens have deprived this defendant of liberty and property without due process of law, and in violation of the Constitution of the United States of America, and particularly in violation of the Fifth and Sixth Amendments to the Constitution.

3. That this defendant has been and will be unable to get a fair trial and will be deprived of the assistance of counsel and necessary witnesses for her defense because the jeopardy assessments and accompanying tax liens prevent her from using her

assets to insure adequate preparation for trial and representation at the trial.

Appellant filed an affidavit in support of the motions (R. 67-69) alleging, among other things, that, as a result of the jeopardy assessment and accompanying tax liens and levies, she was without funds to pay her attorneys, or to pay accountants to audit her records, "such as they are," or to enable her to summon witnesses, or to engage the service of expert accounting witnesses; and that "consequently she cannot safely go to trial."

In reply the Government filed an affidavit (R. 109-112) of an officer of the Internal Revenue Service, based upon the affiant's personal knowledge and records of the Internal Revenue Service, reciting that on November 10, 1953, appellant executed and filed with the Internal Revenue Service, a power of attorney authorizing Myron E. Anderson and Walter N. Oros, her present counsel, to represent her before the Treasury Department in all matters involving her income tax liability for the years 1938 through 1953; that the aforementioned attorneys have represented appellant in all hearings, formal and informal, before the Treasury Department and the Tax Court of the United States since the above date; that Myron E. Anderson had been an employee and officer of the Internal Revenue Service at Boise, Idaho, from 1933 until August 1953, holding, successively, the positions of Deputy Collector, Internal Revenue Agent, Assistant Chief Field Deputy, Chief, Income Tax Division, and Head, Income Tax Division; and that during his tenure with the Internal Revenue Service, Anderson had completed numerous courses in accounting and

income tax law, including courses in both basic accounting and the more complicated studies of corporate and analytical accounting, and that prior to his Government service, he had attended the University of Idaho where he majored in accounting.

On October 17, 1956, the court, after a hearing, denied the motions to dismiss the indictment and for continuance. (R. 71.) In so doing the court noted that appellant's counsel have been representing her in both the civil and criminal phases of the case since 1953, and that one of them, Anderson, had extensive accounting training and long experience in tax matters and was well qualified to protect her interests. The court also stated that if, in its opinion, it should become necessary in the course of the trial to appoint an accountant as an expert witness to insure appellant a fair trial, the court would take appropriate action at that time. In addition the court stated that in view of Anderson's qualifications, it would permit him both to testify as an expert witness for the defense and to participate in the trial as counsel.

Before the first witness was sworn at the trial, appellant moved to dismiss the entire jury panel on the grounds that "the jurors were not selected by chance." (Tr. 4, 8.) In support of the motion, appellant called as a witness the deputy clerk of the court, Paul Boyer, who had charge of the box from which the names of the prospective jurors were drawn. Boyer testified that the slips containing the names of prospective jurors had been placed, unfolded, in an open cigar box; that the slips were "mixed up" before they were drawn; and that although some of the slips were face up in the box and could be read, he did not look at

the names on the slips before they were drawn. Further, that all the slips were drawn from the box before the jury was selected. The only persons near the box were the clerk and deputy clerk of the court. (Tr. 4-8.) The motion was denied. (Tr. 8.)

SUMMARY OF THE EVIDENCE

The evidence to support the verdict may be summarized, briefly, as follows:

Appellant, now 49 years old, has been engaged in prostitution throughout her adult life, first in Ohio, and later in Michigan, Arizona, California, and Idaho. (Tr. 500-502, 500-507, 511, 519-520.) In 1934 she was convicted of pandering in Long Beach, California, and sentenced to imprisonment for one year. (Tr. 507-508.) Shortly after her release from prison in 1935, she went to Burley, Idaho. (Tr. 510.) From 1938 through 1952, she owned and operated a house of prostitution in Burley, Idaho, known as the Lee Rooms, except for relatively short periods during which she leased it. (Tr. 512-513, 519-520, 545.)

No tax return was filed by appellant for the years 1937 and 1938 (Tr. 24); her reported tax liability for the years 1939 through 1946, ranged from \$7.60 for the year 1940 to \$427 for the year 1946 (Pltf. Ex. 7); and for the years 1947, 1948 and 1949, she reported net income of \$4,850, \$3,186, and \$5,502, respectively (Pltf. Exs. 4, 5, 6).

In 1940 appellant went to Alaska and while there had to borrow money. (Tr. 514-517.) She told a girl friend that she went to Alaska because "things were tough" and she "had to go up there to try and earn some money." (Tr. 596-597.) In August 1947, appel-

lant borrowed \$586 from the Idaho Bank and Trust Company. In January 1950, she borrowed \$10,000 from the same bank to pay for improvements to the Lee Rooms. (Tr. 41-43, 89-94, 549; Pltf. Exs. 15, 20, 32.) In the latter part of April 1952, appellant was arrested for selling liquor at the Lee Rooms without a state license (Tr. 528) and subsequently tried and convicted of this offense. (Tr. 159-162, 178-180, 197-201, 337). Appellant leased the Lee Rooms to a friend, Gloria Gordon, from July to November 1952. (Tr. 344, 354, 545.) A part of the Lee Rooms was damaged by fire in January 1952 (Tr. 44-45), but the fire did not interrupt its operation (Tr. 604-605).

The Lee Rooms consisted of 19 rooms, all of which were used for purposes of prostitution; there were no legitimate roomers or boarders. (Tr. 607.) During the prosecution years, appellant employed an average of three girls at the Lee Rooms for purposes of prostitution. Appellant received fifty percent of the girls' earnings. In addition the girls paid appellant \$5 a day for room and board out of their share of the earnings. Appellant sold liquor at the Lee Rooms for fifty cents a drink. When drinks were ordered for the girls, they were served "B" drinks, a non alcoholic mixture of cola and water, for which the customers were charged the same price as for liquor. The girls did not share in the receipts from the sale of drinks. Tr. 206-211, 231-237, 243-247, 520, 523-527, 534, 600-611, 664.)

The prosecution called as witnesses four of the girls who had worked for appellant at the Lee Rooms during the prosecution years.⁴ Three of the girls testified that

⁴ Carol Reeves (Tr. 206-211) worked for four months in early part of 1952; Delores Ganzan (Tr. 213-218) for three weeks in

after turning over one-half of their earnings from prostitution to appellant, the net to them ranged from \$150 to \$200 a week (Tr. 208, 215, 245), and one girl Elberta Downie, testified that she netted about \$300 a week and on occasion as high as \$500 a week. (Tr. 233). Downie also testified that during the period she worked at the Lee Rooms, a record of receipts from the sale of drinks was kept in a "shorthand tablet"; that she added the figures in the tablet for the housekeeper; and that "in the busier time" the liquor receipts totaled "a couple of hundred a week". (Tr. 236-238.)

During the prosecution years, appellant made frequent visits to the Idaho Bank and Trust Company, as often as twice a week, on which occasions she would exchange several hundred dollars or more in \$1 and \$5 bills for \$50 and \$100 bills; on at least one occasion she exchanged a thousand dollars in small bills for a \$1,000 bill. Tr. 172-176, 228-229).

Appellant's tax returns for the years 1950, 1951 and 1952 were prepared by an accountant, Vern G. Hutchinson, from information furnished by her. Hutchinson who was called as a witness by the prosecution testified that he prepared the 1950 return from figures in a "little black book" submitted by appellant which purportedly contained a record of her receipts and expenditures from the operation of the Lee Rooms. One column in the little black book was captioned "room and board", and there were two or three other columns for expenses. There were no entries in the book reflecting receipts

May 1952 (Tr. 329-330); Elberta Downie (Tr. 231-237) from July 1951 to January 1952; Lucille Marcelli (Tr. 243-247) from April to September 1950. Appellant admitted that the girls who testified were not the only girls who had worked for her during the period in question. (Tr. 610.)

from prostitution or from the sale of liquor. For the year 1951, the book had entries for only three months. In preparing the 1951 return, Hutchinson projected the figures for the three months over a year, that is, he multiplied the figures by four. In preparing the 1952 return, he used cancelled checks for expenses and "the income she gave me * * * on a piece of yellow paper." (Tr. 29-36.) The following schedule is a summary of the income reported by appellant in her returns for the years in question (Pltf. Exs. 1, 2, 3):

	1950	1951	1952
Lee Rooms			
Receipts:			
Room and board.....	\$6,650.70	\$6,368.00	\$ 816.00
Room rent.....	763.00	1,212.00	-0-
Music box.....	370.50	448.00	154.50
Other sales.....	-0-	-0-	433.25
Rent (store).....	1,200.00	1,200.00	-0-
Totals.....	\$8,984.20	\$9,228.00	1,403.75
Less: Deductions.....	6,466.32	7,062.26	1,825.53
Net profit (or loss).....	\$2,517.88	\$2,165.74	(\$ 421.78)
Other Income			
Interest.....	17.47	17.81	155.23
Dividends.....	50.00	65.00	108.20
Rental income (net)*.....	-0-	-0-	1,729.19
Loss on operation of ranch.....	-0-	-0-	(1,033.95)
Total income reported.....	<u>\$2,585.35</u>	<u>\$2,248.55</u>	<u>\$ 536.89</u>

* From lease of Lee Rooms and store.

The investigation of appellant's taxability began in May 1953. (Tr. 253.) On July 22, 1953, appellant was interviewed by Special Agent Tullis and Revenue Agent Olsen in the latter's office in Burley. (Tr. 254-255.) At this interview, appellant told the agents that her records had been destroyed in a fire except for "some receipts and checks" for 1952 and a "little black book" in which she had some information relating to her 1951 return. Repeated requests by the agents to see the little black book were fruitless. The only records which appellant produced for the agents consisted of

some receipts and cancelled checks. (Tr. 255-256.) In the course of the interview, she was asked how much cash she had on hand in June 1950 when Agent Olsen had conducted an audit of her 1949 return, and how much cash she then had on hand. She replied that when Olsen conducted the prior audit she had "four or five thousand dollars" in cash, and that all the cash she then had was in her purse and in a safe deposit box at the Idaho Bank and Trust Company. At the request of the agents, she counted the cash in her purse which amounted to \$130. Immediately after the interview, the agents, accompanied by appellant, inventoried the contents of her safe deposit box at the Idaho Bank and Trust Company. It contained, among other things, \$4,000 in currency, consisting of thirty-six \$100 bills and eight \$50 bills. (Tr. 256-258.)

The agents again interviewed appellant on July 29, 1953 (Tr. 260-261), and on this occasion, she told the agents that "the largest amount of currency in her possession at any one time was \$14,000, which she had at the time of her loan to Joe Peters" in June 1951,⁵ and that "she had about this amount in 1949". (Tr. 267.)

At a third interview on September 1, 1953, she told the agents that "she always kept four or five thousand dollars in currency"; that "at the end of 1948 she had \$14,000"; and that she had a like amount at the time of the Peters loan in June 1951. (Tr. 270-271.) Appellant then submitted a sworn statement that to the best of her knowledge and belief she "possessed in cash or currency not more than \$15,000 and not less than \$12,000" as of December 31, 1948. (Tr. 274; Pltf. Ex. 58).

⁵ Appellant had loaned Joe Peters the sum of \$10,000 in June 1951, at which time Peters was the Mayor of Burley. (Tr. 193-195.)

Before signing the statement, appellant had consulted with her attorney and Agent Tullis had explained the purpose of the statement both to her and to the attorney. (Tr. 271-272.)

At the trial, Gloria Gordon testified that in August 1953, she observed appellant counting a large sum of money, consisting mostly of \$50 and \$100 bills, in the bedroom of the latter's ranch home; that after the money had been counted, appellant said it totaled \$46,000 and that "she had saved for a lifetime to save that \$46,000". (Tr. 344-345, 347.)

In February 1954, appellant reported the theft of some \$46,000 in cash to the Sheriff's office in Boise (Tr. 354-359) and to the local office of the Federal Bureau of Investigation (Tr. 339-342.) She told the Sheriff's office that the money represented "twenty years earnings." (Tr. 359.) Shortly thereafter a suspect was arrested. When appellant was called to testify as the complaining witness at the suspect's preliminary hearing in March 1954, she declined to answer questions relating to the theft on the grounds that her answers might tend to incriminate her,⁶ adding, at one point, "[f]urthermore, an Internal Revenue Agent is sitting here now", the reference being to Special Agent Tullis. (Tr. 362-367.)

In the course of the investigation, appellant also told the agents that she did not owe any debts, with the exception of the mortgage on her ranch (Tr. 258); that she never received any gifts or inheritances, except a watch (Tr. 266-267); and that she did not share in the girls' earnings from prostitution, stating that "the

⁶ Appellant was represented at this hearing by her present counsel. (Tr. 364.)

only source of income pertaining to the Lee Rooms * * * was the board and room for the girls'' (Tr. 314-315).

At the trial, the Government's case was based upon the net worth method of proof. Appellant was credited with an opening net worth of some \$62,000, including an item of undeposited cash on hand in the amount of \$15,000. The evidence revealed that during the prosecution years her net worth increased, largely through cash expenditures, from \$62,000 to \$106,000, without taking into account any increase in undeposited cash on hand;⁷ and that based upon the increases in net worth plus nondeductible expenditures, her true net income for the years 1950, 1951 and 1952 was \$12,574, \$12,671, and \$20,739, respectively, whereas she reported income of \$2,585, \$2,248 and \$536, respectively, and that her correct tax liability for the same years was \$2,654, \$3,035, and \$7,490, respectively, whereas she reported a tax liability for 1950 and 1951 of \$92, and \$65.73, respectively, and no tax due for 1952. (Tr. 375-429; Pltf. Ex. 66, 67.) The Government's net worth summary (Pltf. Ex. 66) and computation of tax liability based thereon (Pltf. Ex. 67) are reproduced in the Appendix.

The assets, liabilities and expenditures included in the net worth statement were established by third party testimony and records and were not disputed by appellant, with the exception of the item of cash on hand. The prosecution called some 50 witnesses to identify docu-

⁷ Although the evidence clearly indicated that the amount of appellant's undeposited cash on hand increased substantially during the prosecution years, the Government took the position most favorable to appellant and did not increase this item in any year. (Tr. 385-389, 395, 401, 406-407).

ments and testify concerning transactions with appellant during the years covered by the indictment, and it offered in evidence more than 40 exhibits (including those set out in appellant's brief at p. 10) relating to items in the net worth summary. The prosecution concluded its case in chief with the testimony of Revenue Agent Finley who summarized the net worth evidence and made the tax computation. (Tr. 371-429.) With few exceptions, appellant objected to the testimony and exhibits relating to items comprising her net worth and expenditures on the grounds that "*no corpus delicti*" had been established. (Tr. 38, 40, 41, 43, 47, 50, 58, 62-63, 66, 68-69, 74, 96, 101, 103, 105, 108-110, 129, 131, 134, 142, 144, 149, 151-152, 154, 157, 164-165, 167, 179-180, 183, 190, 194, 198, 201, 203-204, 222-224, 231, 275, 348, 353, 382, 427, 429-431.) In overruling the objections, the court repeatedly stated that it would admit the evidence subject to connection and that if the evidence was not related and shown to be material, it would entertain a motion to strike. (Tr. 38-39, 50, 53, 58-60, 204, 231.)

At the close of the Government's case, appellant moved to strike all the testimony and exhibits admitted over her objection and for judgment of acquittal. She also renewed her motion to dismiss the indictment on constitutional grounds. (Tr. 496-499.) The motions were denied. (Tr. 499.)

The defense was a belated story of a cash hoard on hand at the beginning of the prosecution period sufficient to account not only for the bulge in appellant's net worth during the prosecution years but in addition for the \$46,000 which she reported as stolen in February 1954. Appellant took the stand and made claim to a cash hoard of some \$118,000 as of the end of 1949.

(Tr. 582.) Her testimony, in substance, was that she received a gift of more than \$100,000 in 1932 from a Chinese admirer and a payment of \$10,000 in 1935 from an associate in prostitution, identified as Walter Taylor; that she retained these sums substantially intact down through the years, keeping the money at first in a suitcase, then later in a trunk and finally, beginning sometime in 1946, in a wall safe which she had installed in the Lee Rooms; and that the cash hoard thus acquired and retained, and not her receipts from prostitution and the sale of liquor at the Lee Rooms which she claimed were fully reported in her returns under receipts from "room and board" and "room rent" (Tr. 546-547), accounted for the increases in her net worth during the prosecution years. (Tr. 501-514, 518-519, 521-523, 590-591.)

Appellant gave the following account of the alleged gift from a Chinese admirer: She testified that in 1932 she was working as a prostitute at the Lilly Rooms in Stockton, California; that the Lilly Rooms were located within a block or two of the Oriental district and had as one of its customers a "prominent" and "wealthy" Chinese named Lee Chong, who operated a herb and importing business under his own name at 104-106 Franklin Street, a distance of about a half block from the Lilly Rooms; that Lee Chong took a liking to her and proposed marriage and a life in China; that she accepted; and that to bind the bargain Lee Chong gave her a total of \$113,000 on three occasions in 1932. The gifts, allegedly, were made in Lee Chong's living quarters in the rear of his business establishment. Appellant was quite definite in her testimony that Lee Chong's business establishment was located at 104-106

Franklin Street. (Tr. 660-661.) She testified further that after receiving the gifts, she "thought better" of the bargain and decided against marriage to Chong and a life in China but that Chong was not advised of her change of heart; that she left Stockton carrying Lee Chong's \$113,000 "in a suitcase packed amongst [her] clothes"; that she carried the money about with her in the suitcase while she plied her trade in Oakland, Los Angeles and Long Beach; that after her arrest in Long Beach, she was released on bail and made a trip to Stockton where she stored the money in a trunk at the Lilly Rooms; and that after her release from prison in 1935, she returned to Stockton, picked up the money and shortly thereafter went on to Burley, Idaho, where she kept the money at first in her suitcase, then later in the trunk which she had sent on from Stockton, and finally in the wall safe in the Lee Rooms. Further, that she named her establishment in Burley the Lee Rooms after her Chinese benefactor. (Tr. 501-661.)

On cross examination, appellant admitted she made a false statement to the investigating agents on July 22, 1953, as charged in count four of the indictment, in that she told the agents all the cash which she had at the time was the \$130 in her purse and the \$4,000 in the safe deposit box at the Idaho Bank and Trust Company. (Tr. 617-619.) She also admitted that when she gave the sworn statement to the agents on September 1, 1953, she knew it was false. (Tr. 616-617.) Her explanation of this conduct was that she did not understand the questions asked by the agents (Tr. 557-559, 621), adding (Tr. 558) "[i]f they had explained it, I think I would have perhaps told them what they wanted to know [the source and amount of cash on hand], but I thought

that they were prying into my business and I didn't want to tell them."

In rebuttal the prosecution offered in evidence tending to establish that appellant's claim of a cash hoard acquired by gift from a Lee Chong was a fabrication. Appellant had recounted the story of the alleged gift from Lee Chong for the first time at a conference in May 1955 in the office of the Regional Counsel, Internal Revenue Service. (Tr. 562, 586-591, 715.) However, the address in Stockton of the alleged Lee Chong was not disclosed by appellant until she took the stand at the trial. (Tr. 718-719.) Special Agent Stark testified, over defense objections, that subsequent to the conference in May 1955, an investigation was conducted by the Service in an effort to locate a Lee Chong who had been in the herb and importing business in Stockton at the time fixed by appellant; that the investigation was conducted in Stockton, Sacramento, San Francisco and Los Angeles, California, and surrounding areas; that all reports of the investigation were submitted to him; and that no Lee Chong fitting the description given by appellant was located. (Tr. 711-717.) Further, that an investigation was also made in an effort to locate Walter Taylor who allegedly gave appellant \$10,000 in 1935. Although it was determined that a Walter Taylor fitting the background furnished by appellant died in Phoenix, Arizona, in 1946, this investigation was otherwise inconclusive. (Tr. 717.) The purpose of Stark's testimony was to establish that the Government had discharged its obligation to investigate leads furnished by the taxpayer and reasonably susceptible of being checked. (Tr. 714.) The defense objected to the evidence on the grounds of hearsay. (Tr. 712-714, 717.)

Special Agent Rogers then testified that following appellant's testimony at the trial, in which she gave Lee Chong's address in Stockton (in 1932) as 104-106 Franklin Street, he conducted a further investigation which disclosed that there was no Franklin Street in Stockton prior to 1946 when a street in a new development some four miles from the area fixed by appellant was given that name. In addition, the prosecution placed in evidence a City Directory of Stockton for the years 1931 and 1932. The City Directory did not list any Lee Chong or Chong Lee. (Tr. 719-729; Pltf. Ex. 81, 83.)

At the close of the evidence, appellant renewed all motions previously made, including her motions for judgment of acquittal and to dismiss the indictment on constitutional grounds. The motions were denied. (Tr. 739-740).

At the completion of the charge (Tr. 740-758), the court excused the jury to entertain exceptions; none was taken. (Tr. 758.)

Following the verdict of guilty as charged (R. 88), appellant filed a motion for acquittal on the ground that the evidence was insufficient to sustain the verdict (R. 83-84); a motion for arrest of judgment on the grounds that the court lacked jurisdiction to try appellant while a jeopardy assessment and tax liens were outstanding against her and that she had been denied due process of law (R. 85); and a motion for new trial on sundry grounds, none of which challenged the instructions to the jury (R. 85-87). The motions were denied.

ARGUMENT

I

Appellant Was Not Deprived of Her Rights to the Effective Assistance of Counsel and Due Process of Law as a Consequence of the Jeopardy Assessment

Appellant contends (Br. 37-50) that a result of the jeopardy assessment and accompanying tax liens, her conviction was obtained in violation of her rights to the effective assistance of counsel and due process of law as guaranteed by the Sixth and Fifth Amendments to the Constitution. No claim is made that appellant was tried without benefit of counsel, and throughout the course of these proceedings she has been ably represented by two competent attorneys of her own choosing. The gist of appellant's contention is that in a prosecution for tax evasion based upon net worth proof, the services of an accountant are essential to the enjoyment by a defendant of the right to the effective assistance of counsel and due process of law. This being so, she argues that she was deprived of her right to the effective assistance of counsel because, as a result of the jeopardy assessment and tax liens, she was without funds to engage the services of an accountant to aid her counsel in the preparation and presentation of her defense.⁸ Accordingly, she asks this Court to reverse

⁸ Appellant also argues that the jeopardy assessment and tax liens left her without funds to pay her attorneys and to summon witnesses and pay their fees. However, we doubt that appellant seriously urges upon this Court that her constitutional rights were violated in that the jeopardy assessment left her without funds to adequately compensate her attorneys or to summon witnesses and pay their fees. Assuredly, we are not here concerned with the compensation of appellant's attorneys, and, as her counsel well know (Br. 41), Rule 17(b) of the Federal Rules of Criminal Procedure provides for the payment by the Government of the fees of necessary defense witnesses where the defendant is without funds.

the judgment of conviction and to grant her motion to dismiss the indictment. The argument is without merit.

In the first place, even assuming, *arguendo*, the validity of appellant's premise that in a prosecution for tax evasion based upon net worth proof the services of an accountant are essential to the effective assistance of counsel and due process of law as guaranteed by the Constitution, and we submit that this premise is without support in law, the fact of the matter is that both prior to and during trial, appellant had the services of an expert accountant. The record shows that one of her counsel, Anderson, is a well qualified accountant as well as an attorney with some twenty years experience in the Internal Revenue Service. It would indeed be difficult to find a more qualified accounting expert. Moreover, Anderson, as well as co-counsel Ores, have represented appellant in both the civil and criminal aspects of her tax liability since at least November 1953, a period of almost three years prior to the trial. Appellant's assertion (Br. 39) that if Anderson had been called to testify as an expert witness for the defense, "he would have then been thereafter precluded from participating in or arguing the cause for the defendant" ignores the facts of record. In the course of argument on appellant's motion to dismiss the indictment on constitutional grounds, the court stated that in view of Anderson's qualifications, it would permit him both to testify as an expert witness for the defense and to participate in the trial as counsel. In short, appellant's claim that she lacked the services of an expert accountant to assist her in the preparation and presentation of her defense is without warrant in the record.

Furthermore, appellant's defense did not involve any "complex accounting problems", nor were any posed by the prosecution's evidence. In fact the only item in the net worth computation disputed by appellant was the item of undeposited cash on hand. Her defense was that the increases in her net worth were attributable to a cash hoard which the Government failed to credit. In what respect the jeopardy assessment hindered the presentation of this defense is left to conjecture. In point here is *O'Connor v. United States*, 203 F. 2d 301 (C. A. 4th), in which case the Court of Appeals for the Fourth Circuit rejected an argument similar to that advanced here by appellant. In the *O'Connor* case, the indictment charging tax evasion based upon net worth proof was returned in May 1950; a jeopardy assessment was levied against the defendant and his assets and current income were subjected to liens and levies in August, 1952; and in October 1952, he was brought to trial and convicted. On appeal the defendant contended that he was deprived of a fair trial because of the jeopardy assessment and accompanying liens and levies. In rejecting this contention, the court observed that (p. 303):

But the present contention was not raised until the first day of the trial in the District Court and no offer was then or later made during the trial, nor has any offer been made in this court upon this appeal, to show that the defendant was embarrassed by the assessment in the preparation or trial of the case, or that he would or could have made any other defense than he did present, if the assessment had not been levied. As a matter of fact his own accountant was called as a government witness

and he was free to bring out in cross examination any facts relative to his record that would be helpful to his case. He has been represented throughout by competent counsel skilled in matters pertaining to federal income taxes. There is no claim that the minds of the jury were in any way affected by the levying of the assessment. In effect, the present contention is that the mere levying of a jeopardy assessment against the property of a taxpayer is of itself sufficient to preclude the trial of an indictment against him upon charges of defrauding the United States. We do not think that the bringing of an indictment strips the government of the power to proceed under the provisions of Section 273 of the Internal Revenue Code, 26 U.S.C.A. § 273, by way of jeopardy assessment to restrain a delinquent taxpayer from the disposition of his property, or that the mere levying of such an assessment precludes the prosecution of such an indictment.

Here, as in the *O'Connor* case, there has been no showing by appellant that she was in fact embarrassed in the preparation and presentation of her defense by the jeopardy assessment.

Secondly, the novel proposition here urged by appellant—that in a prosecution for tax evasion based upon net worth proof, the services of an accountant, a lay expert, are essential to the enjoyment by a defendant of his rights to the effective assistance of counsel and due process of law—is without support in authority.

The Supreme Court has ruled that the criminal sanctions provided by Congress in the revenue laws are to be “enforced by the criminal process in the familiar

manner” (*Spies v. United States*, 317 U. S. 492, 495), and that “the settled standards of the criminal law are applicable to net worth cases just as to prosecutions for other crimes,” (*Holland v. United States*, 348 U. S. 121, 138). Accordingly, there is no basis in law for regarding criminal tax cases in general or net worth prosecutions in particular as unique and *sui generis*.⁹

Under “the settled standards of the criminal law”, a defendant’s right to the effective assistance of counsel, guaranteed by the Sixth Amendment, has always been understood to mean the assistance of *legal* counsel and the cases cited by appellant deal with the right to the effective assistance of *legal counsel*. None of the cases cited is authority for holding that the services of lay experts, in this case accountants, are essential to the enjoyment of that right. Nor is it a requirement of due process of law under the Fifth Amendment that a defendant have the services of a lay expert. At least the Supreme Court declined to read such a requirement into the due process clause of the Fourteenth Amendment in a case involving a capital offense and the death penalty. *Smith v. Baldi*, 344 U. S. 561, 568, affirming, 192 F. 2d 540 (C. A. 3d).

In support of the novel proposition advanced here, appellant points (Br. 37-38) to the observations of the Supreme Court in *Holland v. United States*, 348 U. S. 121, 129, that there are “pitfalls inherent in the net worth method”, which “require the exercise of great care and restraint” by the trial courts. Appellant

⁹ Appellant seeks to distinguish this case on the ground that claims of the Government which prosecuted her rather than the claims of other creditors rendered her insolvent. The distinction sought to be drawn is without validity. See *United States v. Brodson*, 241 F.2d 107 (C.A. 7), petition for certiorari pending.

claims (Br. 37-39) that the pitfalls inherent in the method, which she does not pause to analyze, can be avoided if accountants are available to the defense. In appellant's words (Br. 38-39) the pitfalls "can be avoided only if they can be tested beforehand * * * and this testing not only requires substantial preparation, accounting and otherwise, but demands defense trial assistance from persons skilled in the art of accounting." In other words, the pitfalls which concerned the Supreme Court in the *Holland* case are not legal pitfalls but rather matters within the province of those skilled in the art of accounting. It is submitted that the *Holland* case does not support any such proposition. It is clear from the Court's opinion in the *Holland* case, *supra*, pp. 124-125, that it was there concerned with the impact of the use of the net worth technique, and the assumptions upon which it is based, on "the safeguards traditionally provided in the administration of criminal justice." Such matters are not the concern of accountants. At no point in its opinion does the Court indicate that the "dangers" which inhere in the method can be avoided or minimized by those skilled in the art of accounting.

The argument that accounting services are indispensable to the defense of a net worth prosecution is based upon a misconception of the net worth technique. The net worth method does not involve technical accounting concepts. As was observed by the Supreme Court in the *Holland* case, *supra*, 131, the net worth technique "is not a method of accounting at all, except insofar as it calls upon taxpayers to account for their unexplained income." It consists, essentially, of the marshalling of a taxpayer's assets, liabilities, nonde-

ductible expenditures and non-income items for the period under review. These are matters within the peculiar knowledge of the taxpayer. However, the Government, in order to ascertain these facts frequently is obliged, as here, to conduct a long and painstaking investigation into third party records, public records, and other sources. It is apparent that to do so the Government must rely on agents trained in the fundamentals of accounting and investigative techniques. But a net worth statement compiled by the agents is, primarily, the end product of investigative techniques. It is not an accountant's work of art.

Appellant's reliance (Br. 46-49) upon the opinion of the District Court in *United States v. Brodson*,¹⁰ is misplaced. In the *Brodson* case, the defendant was indicted for tax evasion while a jeopardy assessment and tax liens were outstanding against him. The allegations of the indictment were based upon net worth proof. The defendant filed a preliminary motion to dismiss the indictment on the same grounds urged here by appellant. In support of the motion he filed affidavits which were controverted by the Government to the effect that he was indigent and without funds to employ an accountant as a result of the jeopardy assessment and tax liens, and his court appointed counsel filed an affidavit expressing the opinion that the services of accountants were essential to his defense. In this posture of the case, the District Court dismissed the indictment, holding that in a prosecution for tax evasion based upon net worth proof, the services of an accountant were essential as a matter of law to the

¹⁰ 136 F. Supp. 158 (E.D. Wis.), reversed, 241 F. 2d 107 (C.A. 7th), petition for certiorari pending.

effective assistance of counsel and due process as guaranteed by the Sixth and Fifth Amendments to the Constitution; that as a result of the pending jeopardy assessment and tax liens, the defendant was unable to obtain such services; and that, accordingly, defendant's constitutional rights would be violated if he were brought to trial. An appeal was taken by the Government to the Court of Appeals for the Seventh Circuit and the judgment of the District Court was reversed, one judge dissenting, and the indictment reinstated. On rehearing *en banc*, the court, two judges dissenting, adhered to the decision of the panel.¹¹ The Court of Appeals held that the judgment of the District Court was premature and without precedent and that a proper determination of the question presented by the motion to dismiss could be made only after a trial. It is therefore apparent that the *Brodson* case is not authority for the proposition here urged by appellant. But see, *United States v. Allied Stevedoring Corp.*, 138 F. Supp. 555 (S.D. N.Y.)

The novel proposition here urged by appellant has far reaching implications. If it can be said that the services of an accountant are essential to the enjoyment by a defendant of his right to the effective assistance of counsel and due process in a tax evasion case, then all defendants in criminal cases would be entitled to lay experts in addition to legal counsel. As was observed by a majority of the Court of Appeals in the *Brodson* case (241 F. 2d 107, 110):

Such a policy, if now established, would as a matter of consistency be subject to extension to experts

¹¹ The opinion of the panel which was entered on October 31, 1956, is not yet officially reported. See 1956 P-H par. 73,017.

in other fields—psychiatrists, ballistics experts, chemists, physicians, and an unlimited number of other specially trained persons. It is this natural consequence of such a policy which, in addition to the reasons above stated, dictates that, if established, it must be based upon a record containing the actual proceedings at a trial, rather than the inferences drawn from pretrial affidavits.

Another consequence would be to put the Government to a choice of remedies in the enforcement of the revenue laws against taxpayers who fail to render a true account. Congress has imposed both civil and criminal sanctions in order to enforce the revenue laws, and the Supreme Court has clearly indicated that Congress did not intend that the Government should be put to a choice of the remedies. It has repeatedly held that the imposition of one form of sanction does not preclude resort to the other. *Spies v. United States*, 317 U. S. 492; *Helvering v. Mitchell*, 303 U. S. 391. The levying of a jeopardy assessment, provided for in Section 273 (a) of the Internal Revenue Code of 1939, *supra*, is a civil sanction designed by Congress to protect the revenue and to render more effective the tax collecting system.¹² But under appellant's theory, if the Government sought to protect the revenue and invoked the civil sanction of a jeopardy assessment, it would in effect be precluded from initiating a criminal prosecution. It is apparent that such a result was never in-

¹² The statute does not violate due process since it affects only property rights and adequate provision is made for ultimate judicial determination of the liability. See *Phillips v. Commissioner*, 283 U. S. 589; *Dyer v. Gallagher*, 203 F. 2d 477 (C.A. 6th); *Harvey v. Early*, 66 F. Supp. 761 (W.D. Va.), affirmed, 160 F. 2d 836 (C.A. 4th).

tended by Congress in enacting the civil and criminal sanctions it deemed necessary to protect the revenue, and it is respectfully submitted that such a result is not required by Constitutional guarantees. See *O'Connor v. United States*, 203 F. 2d 301, 303 (C.A. 4th).

The record in this case shows that throughout the course of this proceeding, and prior thereto, appellant has been represented by two competent counsel, one of whom is also an expert accountant. It is submitted that appellant's contention that her conviction was obtained in violation of her rights under the constitution is without merit.

The foregoing discussion relates only to the counts charging income tax evasion based upon net worth proof. In addition, appellant stands convicted of having made a false statement in violation of 18 U.S.C., Section 1001 for which she received a concurrent sentence. As we understand her argument, that conviction stands unchallenged.

II

The Trial Court Did Not Abuse Its Discretion in Denying, in Part, Appellant's Motion for a Bill of Particulars

Appellant's contention (Br. 50-54) that the court abused its discretion in denying, in part, her motion for a bill of particulars as to the income tax evasion counts is without merit. Her complaint is that the Government should have been required to disclose, in addition to the fact that it was proceeding under the net worth method, the details of the net worth computation and the source or sources of the alleged unreported income. The answer is that this Court and other Courts of Appeals have repeatedly held, under similar circum-

stances, that the most a defendant is entitled to is a disclosure of the theory of the prosecution's case. That appellant was given. *Remmer v. United States*, 205 F. 2d 277, 281-282 (C.A. 9th); judgment vacated and remanded on other grounds, 347 U. S. 227, reaffirmed, 222 F. 2d 720, reversed on other grounds, 350 U. S. 377; *Blackwell v. United States* (C. A. 8th), decided May 5, 1957 (1957 CCH Par. 9644); *United States v. Caserta*, 199 F. 2d 905, 910 (C. A. 3d); *United States v. Chapman*, 168 F. 2d 997, 999 (C. A. 7th).

Furthermore, the record clearly shows that the particulars requested were known to appellant who had in fact recounted to the agents in the course of the investigation the details of the financial transactions reflected in the net worth summary. (Tr. 254-269, 281-287.) She did not allege surprise at the trial by the nature of the evidence, nor has she made any effort here or in the court below to show that her defense was in any way prejudiced by the denial of the requested particulars. Since the granting or denial of the bill was within the sound discretion of the trial court and no abuse or prejudice appears, its ruling on the application should not be disturbed on appeal. *Wong Tai v. United States*, 273 U. S. 77, 82, *Maxfield v. United States*, 152 F. 2d. 593, 596 (C. A. 9th), certiorari denied, 327 U. S. 794; *Remmer v. United States*, *supra*.

III

Appellant Was Not Prejudiced by the Manner in Which the Jury Was Selected

Appellant contends (Br. 55-56) that the jury "was not selected by chance" in that the slips bearing the names of prospective jurors were not "folded" and placed in a "sealed" box as provided by the laws of the

State of Idaho, and that, accordingly, her motion to dismiss the panel should have been granted. There is no substance to this. In the first place the laws of the State of Idaho relating to the manner in which jurors shall be selected are not controlling here. As was observed by the Supreme Court in *Pointer v. United States*, 151 U. S. 396, 407-408, "the mode of designating and empaneling jurors * * * in the courts of the United States is within the control of those courts, subject only to the restrictions Congress has prescribed, and, also, to such limitations as are recognized by the settled principles of criminal law to be essential in securing impartial juries."

The applicable statute, 28 U.S.C., Section 1864, provides in pertinent part that "the names of * * * petit jurors shall be publicly drawn from a box". That procedure was observed here. And, contrary to appellant's assertion (Br. 56), the slips were shuffled before the drawing (Tr. 6); the names were not read by the Clerk before they were drawn from the box (Tr. 8); and no one else was in a position to observe the names on the slips (Tr. 6). Moreover, all the names in the box were drawn before the panel was selected. (Tr. 7.) In short, appellant, upon whom the burden rested (*Frazier v. United States*, 335 U. S. 497, 503), failed to show any irregularity in the selection of the jury, although given full opportunity by the court on a *voir dire*.

IV

The Court Did Not Err in Ruling on the Admissibility of Evidence

Appellant contends that the court committed prejudicial error in admitting over her objection (a) testi-

mony and exhibits relating to her net worth and expenditures without first requiring the Government to establish an opening net worth, and (b) rebuttal testimony of a Treasury agent as to the fact and results of an investigation conducted by the witness and other agents under his direction.

(a) Throughout the prosecution's case, appellant objected to the admissibility of testimony and exhibits relating to her net worth and expenditures during the prosecution years on the grounds that "no *corpus delecti* had been established "and no opening net worth proved at the time the evidence was offered. (See e. g. Tr. 38, 40, 41, 43, 50, 58-60.) Insofar as the objection was based on the ground that no *corpus delecti* had been established, the short answer is that in the crime of tax evasion there is no *corpus delecti* as such. *Smith v. United States*, 348 U. S. 147, 154. With respect to opening net worth, obviously it cannot be established in one fell swoop as the court below pointed out in admitting the evidence subject to connection. (Tr. 39, 53.) Actually, appellant does not challenge (Br. 56-58) the competency, relevancy or materiality of the evidence but rather the order in which it was presented, a matter within the discretion of the court and one not infrequently dictated by circumstances. The jury could hardly have been led astray and the appellant prejudiced by the order in which the evidence was presented for the significance of the evidence was made crystal clear in the course of the testimony of the Government's expert who was called, at the conclusion of the prosecution's case, to summarize the net worth evidence and compute the tax allegedly evaded. Since all of the evidence objected to by appellant was connected up

by the prosecution, the court properly denied her motion to strike.

(b) Appellant contends (Br. 62-64) that her objection to the testimony of Special Agent Stark as hearsay should have been sustained, and that the admission of the testimony was improper and prejudicial. Stark was the agent in charge of the investigation which had been conducted in an effort to locate a Lee Chong and Walter Taylor, following appellant's appearance at a conference in the Treasury Department where she related for the first time the story of the cash hoard acquired by gift. The reports of other agents cooperating in the investigation were submitted to Stark. The stated purpose of Stark's testimony was to establish the fact that an investigation of the "leads" furnished by appellant had been made and that the Government had discharged its obligation in this respect. (Tr. 712-714.) Having been in charge of the investigation, Stark was certainly competent to testify from personal knowledge that one had been made. And even assuming, *arguendo*, that his testimony as to the negative results of the investigation was, in part, hearsay, this fact was established by other competent and unquestioned evidence, with the result that the error, if any, was harmless. It was the rebuttal testimony of Special Agent Rogers and the exhibits introduced in the course of his testimony which exploded the incredible tale of Lee Chong and the \$113,000 gift, if the jury had entertained any lingering doubts after appellant's testimony. Furthermore, it is not without significance that appellant's counsel passed cross examination of Stark. (Tr. 718.)

V

The Court Did Not Restrict the Cross Examination of Prosecution Witnesses Nor Did It Comment on the Importance and Weight of the Evidence to the Prejudice of Appellant

The assertion by appellant (Br. 58-60) that the court abused its discretion by unduly restricting cross examination of prosecution witnesses, specifically, the investigating agents, is without warrant in the record. The fact of the matter is that cross examination of the agents was not restricted, unduly or otherwise. The record shows (Tr. 119, 240, 308-309, 437, 441-443, 451-452, 566, 592) that the court, if anything, was extremely liberal allowing defense counsel "free rein" on numerous occasions. Moreover, the court, at appellant's request, suspended its rules to permit *both* of her counsel to cross examine the Government's expert. (Tr. 431-493).

Nor did the court, as appellant asserts (Br. 60-62) comment to her prejudice on the weight and importance of the evidence. Here too, the record belies the claim for at no point in the trial did the court comment on the importance of the evidence. And it was careful to instruct the jury early in the trial (Tr. 112) that "you will pay no attention to any remarks of counsel made in arguing their objections or any remarks of the court * * * because they have nothing to do with your portion of the case." This admonition was repeated in the charge. (Tr. 742-743).

VI

**There Was No Error in the Instructions Much Less Plain Error
of the Character Which This Court Should Notice Even
Though No Exception Was Taken to the Charge**

Appellant challenges (Br. 64-67) the correctness of the instructions for the first time on appeal. Since no exception was taken to the charge (Tr. 758), appellant cannot be heard to complain now unless the error assigned is so plain and prejudicial as to require reversal by this Court in order "to prevent a miscarriage of justice or to preserve the integrity of judicial proceedings". *Herzog v. United States*, 235 F. 2d 664, 666 (C.A. 9th), certiorari denied, 352 U.S. 844; Rules 30 and 52, Federal Rules of Criminal Procedure, *supra*.

The jury was instructed, in part, as follows (Tr. 749-751, 753-754), with the language complained of by appellant (Br. 30, 64-67) in italics:

The question of intent is a matter for you, as jurors, to determine and, as intent is a state of mind and it is not possible to look into a man's mind to see what went on, the only way you have of arriving at the intent of the defendant in this case is for you to take into consideration all the facts and circumstances shown by the evidence, including the exhibits and determine from all such facts and circumstances what the intent of the defendant was at the times in question. Thus, direct proof of wilful or wrongful intent or knowledge is not necessary. *Intent and knowledge may be inferred from acts* and such inferences may arise from a combination of acts, although each act standing by itself

may seem unimportant. These are questions of fact to be determined from all the circumstances.

* * * *

On the question of intent to evade income taxes there are certain matters which you may consider as pointing to such intent, if you find that they exist in this case. General illustrations are: keeping a double set of books, making false entries in the books, altering invoices, destruction of books, concealment of assets, covering up sources of income, handling one's affairs to avoid the making of usual records, *and any conduct the likelihood of which would be to mislead or conceal*. These instances are given you simply to illustrate the type of conduct from which you may infer intent to evade taxes. If the tax evasion motive plays any part in such conduct, the offense may be made out even though the conduct I have mentioned might also serve some other purpose.

* * * *

In the indictment and testimony in this case a number of figures have been mentioned with respect to both the alleged understatements of income and the alleged understatement of taxes. The government is not required to prove the exact figures alleged in the indictment. *It is sufficient* for the government to prove that a substantial amount of Mrs. Summers' income for that year was not shown on her tax return. With respect to the understatement of tax, *it is sufficient* for the government to prove that Mrs. Summers owed a substantial

amount of tax each year in addition to that shown on her return. Mathematical precision in amount is not required. *It is important only* that the return which was filed was false in the particulars alleged and that the defendant thereby had knowledge of such falsity. The gist of the offense in each of these acts is wilful attempt on the part of the defendant to evade and defeat a part of the income tax alleged to be due to the United States. The specific means of evasion alleged is the filing of false returns with intent by so doing to defeat the tax or a portion thereof. The attempt must be wilful and intentional. *If you believe* from the evidence that the returns were incorrect, but that the defendant made them in good faith, she is not guilty of the offense charged. Carelessness or negligence, unaccompanied by bad faith, does not render her guilty. *If you believe* the falsity was wilful and made with fraudulent intent, *you should find the defendant guilty*. If you have reasonable doubt on the subject as it has been defined to you in these instructions, you should find the defendant not guilty.

*

*

*

*

*

The point need not be labored that in the context used here the challenged language was not error, much less error of the kind which would warrant invocation of Rule 52(b). In *Norwitt v. United States*, 195 F. 2d 127, 132 (C.A. 9), this Court observed that it is “hornbook law that the Government need not adduce direct proof of intent. It may be inferred from the defendant’s acts”. The challenged language in the second paragraph above quoted was taken verbatim from *Spies v.*

United States, 317 U.S. 492. Appellant's objection to the use in the third paragraph of such phrases as "it is sufficient" and "if you believe" may best be characterized as mere "fly-specking". Compare, *Lurding v. United States*, 179 F. 2d 419 (C.A. 6th) which is relied on by appellant.

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment of the District Court should be affirmed.

Respectfully submitted,

CHARLES K. RICE,
Assistant Attorney General.

JOSEPH M. HOWARD,

JOHN J. MCGARVEY,

Attorneys.

BEN PETERSON,

United States Attorney.

MAY, 1957.

APPENDIX

PLAINTIFF'S EXHIBIT NO. 66

Assets:	12-31-49	12-31-50	12-31-51	12-31-52
Cash on Hand.....	15,000.00	15,000.00	15,000.00	15,000.00
Bank Credits.....	5,622.60	9,883.95	14,234.40	13,310.75
U. S. Savings Bond.....	18.75	18.75	18.75	18.75
Loans Receivable.....	2,000.00	9,000.00	19,750.00	11,300.00
Stocks—Bonds—Leases.....	8,000.00	8,000.00	8,000.00	8,000.00
Escrow Contracts Receivable.	2,383.04	—0—	6,403.97	5,810.66
Twin Falls House.....	9,000.00	9,000.00	.....	.....
Lee Rooms—Bldg. and Imp...	20,851.67	30,337.37	30,337.37	30,337.37
Lee Rooms—Furn. and Fix- tures.....	3,592.76	5,252.40	5,252.40	5,252.40
Farm and Farm Bldgs.....	.....	.....	.....	29,010.35
Personal Furniture.....	3,300.00	3,300.00	3,300.00	5,167.25
Trailer House.....	.....	1,000.00	1,000.00	.....
Cattle Purchased.....	.....	.....	.....	5,610.00
Farm Truck.....	.....	.....	.....	1,500.00
11th Dist. Court Bail Bond..	.....	.....	.....	2,500.00
Total Assets at Cost.....	69,768.82	90,792.47	103,296.89	132,817.53
Less Depreciation.....	7,591.57	9,045.31	10,543.12	12,813.86
Total Assets Red. by Depr. Reserve.....	62,177.25	81,747.16	92,753.77	120,003.67
Liabilities:.....	.....	8,166.02	6,258.05	13,894.62
Net Worth:.....	62,177.25	73,581.14	86,495.72	106,109.05

Computation of Adjusted Gross Income

Net Worth End of Year.....	73,581.14	86,495.72	106,109.05
Net Worth Beginning of Year.....	62,177.25	73,581.14	86,495.72
Increase in Net Worth During Year.....	11,403.89	12,914.58	19,613.33
Non-Taxable Income.....	.....	(500.00)	.....
Non-Deductible Expenditures.....	2,170.32	1,256.46	2,126.00
Adjusted Gross Income.....	13,574.21	13,671.04	21,739.33

PLAINTIFF'S EXHIBIT NO. 67

Computation of Tax

	1950	1951	1952
Adjusted Gross Income.....	\$13,574.21	\$13,671.04	\$21,739.33
Less Standard Deductions.....	1,000.00	1,000.00	1,000.00
Net Income.....	12,574.21	12,671.04	20,739.33
Less Exemptions (3 x 600).....	1,800.00	1,800.00	1,800.00
Taxable Income.....	10,774.21	10,871.04	18,939.33
Tax Liability.....	2,654.12	3,035.71	7,490.20
Per Return.....	92.00	65.73	—0—
Deficiency in Tax.....	2,562.12	2,969.98	7,490.20



No. 15459

United States
Court of Appeals
for the Ninth Circuit

JOE GRENIER,

Appellant,

vs.

JAMES W. HARLEY, Special Administrator with
General Powers of the Estate of Dan L. Harley,
deceased, Appellee.

Transcript of Record

Appeal from the United States District Court for the
Southern District of California,
Central Division

FILED

MAY - 8 1957

PAUL P. O'BRIEN, CLERK



No. 15459

United States
Court of Appeals
for the Ninth Circuit

JOE GRENIER,

Appellant,

vs.

JAMES W. HARLEY, Special Administrator with
General Powers of the Estate of Dan L. Harley,
deceased,

Appellee.

Transcript of Record

Appeal from the United States District Court for the
Southern District of California,
Central Division



INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

	PAGE
Amended Complaint	3
Answer to Amended Complaint.....	6
Appeal:	
Certificate of Clerk to Transcript of Record on	25
Notice of	25
Statement of Points on (USCA).....	256
Certificate of Clerk to Transcript of Record...	25
Complaint, Amended	3
Findings of Fact and Conclusions of Law.....	15
Judgment	21
Memorandum of Law.....	12
Names and Addresses of Attorneys.....	1
Notice of Appeal.....	25
Pre-Trial Opening Statement (Plaintiff's)....	13
Pre-Trial Stipulation (Plaintiff's Exhibit No. 2)	7
Statement of Points to Be Relied Upon (Appel- lant's—USCA)	256

Transcript of Proceedings and Testimony.....	27
Closing Argument of Mr. Boshae.....	240
Closing Argument of Mr. Young.....	237
Witnesses:	
Bretschneider, Eva Lee	
—direct (Boshae)	138
—cross (Young)	142
—redirect (Boshae)	152
Edgar, Joseph H.	
—direct (Young)	29
—cross (Boshae)	48
—redirect (Young)	52
Gordon, Jessie B.	
—direct (Boshae)	174
—cross (Young)	177
Grenier, J. H.	
—direct (Young)	69
—direct (Boshae)	219
—cross (Young)	232
Harley, James W.	
—direct (Young)	104, 111
—cross (Boshae)	117
—redirect (Young)	128
—recross (Boshae)	130
Jenkins, Jack R.	
—direct (Boshae)	186
—cross (Young)	189

Transcript of Proceedings—(Continued):

Witnesses—(Continued):

MacMartin, Peggy

—direct (Boshae)	179
—cross (Young)	182

Miller, William L.

—direct (Boshae)	163
—cross (Young)	165
—redirect (Boshae)	174

Ogden, Dr. Walter R.

—direct (Boshae)	197
—cross (Young)	205

Steelman, Dr. Stuart P.

—direct (Young)	54
—cross (Boshae)	61

Whitworth, Walton N.

—direct (Boshae)	153
—cross (Young)	155



NAMES AND ADDRESSES OF ATTORNEYS

FOR APPELLANT:

GEORGE BOSHAE, Esq.,
608 South Hill Street,
Los Angeles 14, California.

FOR APPELLEE:

LYNDOL L. YOUNG,
H. ELLIOT POWNALL, JR.,
Suite 843 General Petroleum Bldg.,
612 South Flower Street,
Los Angeles 17, California.

1. The first part of the document is a list of the names of the persons who have been appointed to the various offices of the city of New York.

2. The second part of the document is a list of the names of the persons who have been appointed to the various offices of the city of New York.

3. The third part of the document is a list of the names of the persons who have been appointed to the various offices of the city of New York.

4. The fourth part of the document is a list of the names of the persons who have been appointed to the various offices of the city of New York.

5. The fifth part of the document is a list of the names of the persons who have been appointed to the various offices of the city of New York.

6. The sixth part of the document is a list of the names of the persons who have been appointed to the various offices of the city of New York.

7. The seventh part of the document is a list of the names of the persons who have been appointed to the various offices of the city of New York.

8. The eighth part of the document is a list of the names of the persons who have been appointed to the various offices of the city of New York.

9. The ninth part of the document is a list of the names of the persons who have been appointed to the various offices of the city of New York.

10. The tenth part of the document is a list of the names of the persons who have been appointed to the various offices of the city of New York.

United States District Court, Southern District
of California, Central Division

No. 187-15 W.M.

JAMES W. HARLEY, SPECIAL ADMINIS-
TRATOR WITH GENERAL POWERS of
the Estate of DAN L. HARLEY, Deceased,
Plaintiff,

vs.

JOE GRENIER, Defendant.

AMENDED COMPLAINT TO CANCEL DEED
AND FOR OTHER RELIEF

Comes now, the plaintiff, and for cause of action
against the defendant alleges as follows, to-wit:

I.

Plaintiff is a citizen and resident of the County
of Los Angeles and of the State of California, and
is the duly appointed, qualified and acting Special
Administrator with General Powers of the Estate
of Dan L. Harley, deceased, and was so duly ap-
pointed by the Probate Department of the Supe-
rior Court of the State of California, in and for
the County of Los Angeles, by Letters of Special
Administration with General Powers of said estate
duly issued to him thereby on August 29, 1955. That
at all times herein mentioned Dan L. Harley, de-
ceased, was a citizen and resident of the County of
Los Angeles and of the State of California; that
at all times herein mentioned the defendant Joe

Grenier was and is a citizen and resident of the County of Powell and of the State of Montana. The matter in controversy exceeds, exclusive of interest and costs, the sum of \$3,000.00.

II.

Dan L. Harley died on July 30, 1955, at the age of 77 years; that for a period of approximately three months prior to the death of said decedent he was critically ill, bed-ridden and suffered from heart failure, chronic chest difficulties which required the continuous use of oxygen, general physical and mental debility, exhaustion and fatigue; that during all of said period said defendant Joe Grenier was constantly in attendance at the home of the said decedent in the City of Glendale, California, and acted as the agent and attorney-in-fact for the said decedent, and bore a confidential relationship to said decedent. Plaintiff is informed and believes, and upon such information and belief, alleges that on or about July 12, 1955, the said defendant Joe Grenier, without consideration and by fraudulently and surreptitiously taking advantage of the weakened mental and physical condition of said decedent, procured the signature of said decedent to a Deed under the terms whereof the said decedent conveyed to said defendant Joe Grenier the following described real property situated in the City of Deer Lodge, County of Powell, State of Montana; to-wit: 210 Milwaukee Avenue, 500 Main Street and 502 Main Street. The plaintiff does not have the legal description of said property but when

the same is obtained leave to amend the complaint to show said legal description thereof will be requested. The fair market value of said real property is the sum of \$35,000.00.

III.

That unless restrained by this Honorable Court from so doing the defendant will transfer, convey, assign and encumber said real property hereinabove described to other parties pending the trial of this action.

Wherefore plaintiff prays judgment as follows:

That said Deed conveying the real property described herein be cancelled; that the defendant be required to execute a good and sufficient Deed conveying said property to the plaintiff; that defendant be restrained and enjoined from selling, conveying or encumbering said real property pending the trial of this action; that in the event said real property described herein has been conveyed to third parties by the defendant prior to the bringing of this action that plaintiff have judgment against said defendant for the sum of \$35,000.00, the value of said real property, together with interest on said amount; for plaintiff's costs herein and such other and further relief as is just and equitable.

LYNDOL L. YOUNG and

H. ELLIOT POWNALL, JR.,

/s/ By LYNDOL L. YOUNG,

Attorneys for Plaintiff.

Affidavit of Service by Mail attached.

[Endorsed]: Filed September 13, 1955.

[Title of District Court and Cause.]

ANSWER TO AMENDED COMPLAINT

Comes now the defendant, Joe Grenier, and for himself alone in answer to the amended complaint on file herein admits, denies and alleges as follows:

I.

Answering Paragraph II of the said complaint said defendant generally and specifically denies each and every allegation therein contained except that said defendant admits that the decedent prior to his death conveyed to said defendant, Joe Grenier, the real property described in plaintiff's amended complaint as an unconditional executed gift and that said decedent intended the same as such.

For a first further separate defense defendant alleges:

I.

That at the time the decedent conveyed to the defendant, Joe Grenier, the real property mentioned in said amended complaint the conveyance was intended to be made to said defendant as an unconditional gift to be owned by said defendant as his absolute, sole and separate property and that said gift was fully executed.

For a second further and distinct affirmative defense defendant alleges:

I.

Defendant refers to his allegations contained in Paragraph I of his first further and affirmative defense and by reference incorporates the same herein as though set forth in full.

II.

That by reason of the conduct of the plaintiff aforesaid said plaintiff has been guilty of laches and unreasonable delay in bringing this action.

Wherefore defendant prays that the claim of the plaintiff be denied and that defendant recover his costs of suit herein incurred and for such other and further relief as this court shall deem just and proper.

Dated this 22nd day of December, 1955.

/s/ GEORGE BOSHAЕ,
Attorney for Defendant.

Affidavit of Service by Mail attached.

[Endorsed]: Filed December 27, 1955.

[Title of District Court and Cause.]

PLAINTIFF'S EXHIBIT No. 2
PRE-TRIAL STIPULATION

Pursuant to the Order of the Court the attorneys for the respective parties in the above entitled action stipulate as follows:

(a) Statement of Admitted Facts:

1. That Dan L. Harley died on July 30, 1955. Prior to his death he was a citizen and resident of the County of Los Angeles, State of California.

2. That James W. Harley is the duly appointed, qualified and acting Special Administrator With General Powers of the Estate of Dan L. Harley, Deceased. That James W. Harley at all times men-

tioned in the Amended Complaint was and now is a citizen and resident of the County of Los Angeles, State of California. That James W. Harley is the nephew and only heir of said decedent, Dan L. Harley.

3. That at all times mentioned in the Amended Complaint the defendant Joseph Grenier was and now is a citizen and resident of the County of Powell, State of Montana.

4. That on May 16, 1955, the decedent, Dan L. Harley, owned the real property involved in this action which is located at Deer Lodge, Montana. That the legal description of said real property is as follows:

The north sixteen and a half (N 16½) feet of Lot Nineteen (19) and all of Lot Twenty (20) in Block Twenty-four (24) of the original townsite of the City of Deer Lodge, County of Powell, State of Montana, according to the official plat and survey thereof now on file and of record in the office of the County Clerk and Recorder in and for the County of Powell, State of Montana, to which plat and survey reference is hereby made for a more particular description thereof.

That on May 16, 1955, the decedent Dan L. Harley signed a deed which conveyed said real property to the defendant, Joe Greiner. That the defendant, Joe Grenier, did not pay any money consideration to the decedent, Dan L. Harley, for the conveyance of said real property. That Eva Lee Bretschneider, a Notary Public, notarized the signature of said

decedent, Dan L. Harley, on said deed. That said Notary was taken by the defendant, Joe Grenier, to the home of said decedent for the purpose of notarizing said deed.

5. That the defendant, Joe Grenier, purchased the said above described deed from a stationery store in Glendale and procured the services of a Public Stenographer located in Glendale to fill out the typed portions thereof.

(b) Statement of Unadmitted Facts—Not to Be Contested: 1. None.

(c) Statement of Unadmitted Facts—To Be Litigated: Plaintiff's statement.

1. That on May 16, 1955, the decedent, Dan L. Harley, was mentally and physically sick and in a critical condition. That he was practically blind and was confined either to his bed or a wheelchair.

2. That the defendant, Joe Grenier, took advantage of the weakened physical and mental condition of said decedent and induced said decedent to sign a deed conveying the real property hereinabove described to defendant. That on the date said deed was signed, to-wit, May 16, 1955, the defendant stood in a fiduciary relationship to said decedent.

3. That defendant represented to said decedent that by placing the title to the real property hereinabove described in defendant's name the said decedent would be protected in not having said real property involved in certain litigation pending in the Superior Court in the County of Los Angeles,

State of California, between said decedent and the sister of the deceased wife of said decedent.

4. That defendant concealed from Joseph H. Edgar, who the defendant personally knew was the attorney for said decedent, that said decedent had signed a deed conveying said real property hereinabove described to defendant until on or about July 16, 1955, at which time upon being questioned by the said Joseph H. Edgar the defendant stated in substance as follows:

That the bank accounts of Dan L. Harley were in joint tenancy with the defendant and that he, the defendant, had been paying all the bills of Dan L. Harley and that he had checks and records to support all payments. That the said Edgar then asked said defendant what was going to happen to the joint tenancy accounts when Dan L. Harley died, as they ordinarily would go to the defendant as the surviving tenant, and the said Edgar thereupon asked said defendant if it was his intention to retain the balance in the said bank accounts as his own property when the said Dan L. Harley died; that the said defendant thereupon stated that just as soon as an executor was appointed for the estate of Dan L. Harley, he, the defendant, would turn over all the balances in the joint bank accounts to said executor, and further stated "I will just have to be trusted on this." That the said Edgar then stated to said Grenier substantially as follows: "I understand that the Montana property has been deeded to you," and said defendant replied, "That is right." The said Edgar then stated,

“What is back of the deeding of the Montana property to you? Does Dan Harley figure he can get around the Tessie Harley Will contest by deeding it to you?” And the said defendant replied, “That is right.”

5. That the defendant likewise concealed from James W. Harley, the nephew and only heir of the decedent Dan L. Harley, that the real property hereinabove described was deeded to said defendant by said decedent.

(c) Defendant's Statement: 1. That the real property hereinabove described was conveyed to the defendant, Joe Grenier, by the decedent, Dan L. Harley, as an unconditionally executed gift and that said decedent intended the same as such.

(d) Schedule of Exhibits: 1. The deed, or a photostatic copy thereof, hereinabove mentioned. The signature of Dan L. Harley on said deed is admitted by the plaintiff.

(e) Statement of Objections Reserved: All objections are reserved by the parties to the admissibility in evidence of any admitted fact.

H. ELLIOT POWNALL, JR. and
LYNDOL L. YOUNG,

/s/ By LYNDOL L. YOUNG,

Attorneys for Plaintiff and Cross-
Defendant.

/s/ GEORGE BOSHAЕ,

Attorney for Defendant and Cross-
Complainant.

Acknowledgment of Service attached.

[Endorsed]: Filed April 18, 1956.

[Title of District Court and Cause.]

MEMORANDUM OF LAW

Point I.

The defendant stood in a confidential relationship to Dan L. Harley, deceased, and in law was deemed a trustee in all of his dealings with said decedent.

Sections 2219, 2228, 2229, 2231, 2234 and 2235, Civil Code of California.

Point II.

The defendant induced the decedent, Dan L. Hurley, to convey the real property involved in this action to defendant through fraud and undue influence.

Sections 1572 and 1573, Civil Code of California.

Sime v. Malouf, 95 CA 2d 82;

Bank of America v. Sanchez, 3 CA 2d 238;

Estate of Arbuckle, 98 CA 2d 562;

Hayter v. Fulmor, 92 CA 2d 392;

Hickson v. Gray, 91 CA 2d 684;

Levy v. Industrial Finance Corporation, 16 Fed 2d 770;

Anderson v. Thatcher, 76 CA 2d 50.

Respectfully submitted,

H. ELLIOT POWNALL, JR., and

LYNDOL L. YOUNG,

/s/ By LYNDOL L. YOUNG,

Attorneys for Plaintiff and Cross-
Defendant.

Acknowledgment of Service attached.

[Endorsed]: Filed April 18, 1956.

[Title of District Court and Cause.]

PLAINTIFF'S PRE-TRIAL OPENING
STATEMENT

1. On May 16, 1955, Dan L. Harley was both mentally and physically ill and was practically blind. He was confined either to his bed or his wheelchair; he suffered from heart disease and respiratory involvement and was required to take oxygen both night and day. He suffered a stroke on March 22, 1955, and died on July 30, 1955.

(a) The foregoing facts will be established by evidence through the testimony of witnesses, including the following:

Joseph H. Edgar, James W. Harley, and perhaps others, including the defendant, and Garnett Studebaker, who was the nurse for Dan L. Harley during the period from March 22 to July 30, 1955.

2. The defendant on May 16th, 1955, held the Power of Attorney of Dan L. Harley and signed checks on the bank accounts of Dan L. Harley, which for convenience only stood in the joint names of Dan L. Harley and the defendant.

(a) The foregoing facts will be established through the sworn admissions of the defendant.

3. That on May 16, 1955, the defendant purchased a printed form deed from a stationery store in Glendale; that he took said deed to a Public Stenographer in Glendale and instructed the said Public Stenographer what to type into said deed; that defendant also transported Mrs. Eva Lee Bret-

schneider, a Notary Public, from the Glendale branch of the Bank of America, where she was employed, to the home of Dan L. Harley for the purpose of notarizing the signature of Dan L. Harley.

(a) The foregoing evidence will be established through the sworn admissions of the defendant, the deposition or testimony of said Notary Public and the introduction in evidence of the said deed.

4. That said defendant, prior to May 16, 1955, represented to Dan L. Harley that he should place the title to the real property involved in this action in the name of the defendant solely for the purpose of protecting the said Dan L. Harley from having said real property involved in certain litigation that was pending in Los Angeles County between the said Dan L. Harley and a sister of the deceased wife of Dan L. Harley.

(a) The foregoing evidence will be established through the testimony of Joseph H. Edgar, who was the attorney for Dan L. Harley during the period March 22 to July 30, 1955, and was also the executor named in the Will of Dan L. Harley dated April 7, 1955.

5. That the defendant did not pay any consideration at all to Dan L. Harley for the deed to the property involved in this action.

(a) The foregoing facts will be established by the sworn admissions of the defendant.

In addition to the facts hereinabove set forth the

plaintiff will develop his case against the defendant at the trial through the cross examination of the defendant under F.R.C.P. 43 (b), and by impeachment evidence.

Dated: April 18th, 1955.

H. ELLIOT POWNALL, JR., and
LYNDOL L. YOUNG,
/s/ By LYNDOL L. YOUNG,
Attorneys for Plaintiff.

Acknowledgment of Service attached.

[Endorsed]: Filed April 18, 1956.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above entitled action came on regularly for non-jury trial on October 31, 1956, before Honorable William C. Mathes, Judge of the above entitled Court. Plaintiff was represented by his attorneys, Lyndol L. Young, Esq., and H. Elliot Pownall, Jr., Esq. Defendant was represented by his attorney, George Boshae, Esq. Evidence both oral and documentary was presented to the Court by the plaintiff and defendant. The trial of said action was concluded on November 1, 1956. Having considered the evidence presented and heard argument by plaintiff and defendant, the Court now makes the following Findings of Fact and Conclusions of Law.

Findings of Fact

The Court finds the facts to be as follows:

1. Plaintiff at all times involved in this proceeding was and is the Special Administrator with General Powers of the Estate of Dan L. Harley, deceased, No. 368110 in the Superior Court of the State of California in and for the County of Los Angeles. At the commencement of this action plaintiff was a citizen of the State of California, and defendant was a citizen of the State of Montana. The matter in controversy exceeds, exclusive of interest and costs, the sum of \$3,000.00.

2. That Dan L. Harley died on July 30, 1955, at the age of 77 years. That for a period of several months prior to the death of said decedent he was critically ill, bed-ridden, suffered from heart failure, chronic chest difficulties, arteriosclerosis, general physical debility, exhaustion and fatigue. That defendant for a period of several months prior to the death of said decedent acted as a business agent and attorney in fact for said decedent, and in such capacity attended to the financial and business affairs of said decedent. That said defendant on May 16, 1955, bore a confidential relationship toward said decedent and said decedent on said date, to-wit, May 16, 1955, and for a long time prior thereto and thereafter until he died, reposed trust and confidence in defendant; and during all of that time defendant had knowledge of and accepted the trust and confidence of the decedent, and acted thereon. That on May 16, 1955, defendant caused a grant

deed to be prepared under his supervision and directions by a public stenographer; that said grant deed conveyed from the decedent to the defendant the real property described in paragraph I of the Amendment to Plaintiff's Amended Complaint herein.

That no consideration passed from defendant to decedent for the execution of said deed by the decedent. That defendant obtained the execution of said deed by the decedent through undue influence and constructive fraud practiced by defendant on the decedent.

That decedent was not incompetent at the time said deed was executed by decedent, to-wit, May 16, 1955.

3. That it was not the intention of the decedent in executing and delivering said deed to the defendant to make a gift of the real property described in said deed to defendant. That it was the intention of the decedent in executing and delivering said deed to the defendant to vest the title to the real property described in said deed in the defendant only as trustee for the decedent.

4. That defendant has collected the rents from the real property described in said deed since June 1, 1955, in the respective sums of \$235.00 per month for each month subsequent to June 1, 1955, to and including November 1, 1956, amounting to a total sum of \$4,230.00.

5. That defendant has expended for necessary repairs and maintenance of said real property de-

scribed in said deed and for insurance and taxes since June 1, 1955, the sum of \$1,498.93.

6. That the defendant holds the title to the real property described in said deed and described in paragraph I of Plaintiff's Amendment to Plaintiff's Amended Complaint as trustee for the Estate of Dan L. Harley, deceased.

7. That the allegations contained in paragraphs I and II of the Cross-complaint of the defendant are untrue; that the denials and allegations contained in paragraphs I and II of Plaintiff's Answer to the Cross-complaint of defendant are true.

Conclusions of Law

The Court Concludes:

1. In all respects as set forth in the foregoing Findings of Fact.

2. The Court has jurisdiction of the parties and of the subject matter of the cause of action set forth in Plaintiff's Amended Complaint, as amended.

3. Said findings having been made upon issues which are determinative of the cause, any further findings or findings upon issues other than those embraced in the foregoing findings would be immaterial, and are not made for that reason.

4. That plaintiff is entitled to judgment against defendant in the sum of \$4,230.00 representing the total rents collected by the defendant from the real property described in paragraph I of Plaintiff's Amendment to Plaintiff's Amended Complaint since

June 1, 1955, to and including November 1, 1956. That defendant is entitled to a credit on said amount of \$4,230.00 in the sum of \$1,498.93 representing expenditures made by defendant for the necessary repairs and maintenance on said real property and insurance and taxes paid by the defendant, leaving a balance due from defendant to plaintiff in the sum of \$2,731.07, together with interest in the amount of \$200.00, thereby making a total sum of \$2,931.07, which sum of money the defendant holds as trustee for the plaintiff.

5. That plaintiff is entitled to judgment against the defendant which orders and decrees that defendant holds the title described in said deed executed by the decedent on May 16, 1955, as trustee for the Estate of Dan L. Harley, deceased.

6. That plaintiff is entitled to judgment against defendant directing and ordering the defendant to execute the grant deed which has been lodged with the Clerk of the Court and which conveys said real property described in paragraph I of plaintiff's Amendment to Plaintiff's Amended Complaint to the Estate of Dan L. Harley, deceased; and further ordering and directing that defendant execute and acknowledge the execution of said grant deed before the Clerk of the Court within 10 days after notice to the defendant's attorney of the signing of the judgment herein by the Court.

7. The Clerk of the Court shall deliver said grant deed after the same has been executed and acknowledged by the defendant to the attorneys for

the plaintiff, as and when the judgment in favor of plaintiff herein shall become final.

8. That plaintiff is entitled to judgment against the defendant restraining and enjoining defendant from encumbering, transferring or signing the title to said real property described in paragraph I of Plaintiff's Amendment to Plaintiff's Amended Complaint pending the time that defendant executes the grant deed lodged with the Clerk of the Court and until the further order of the Court.

9. That plaintiff is entitled to judgment that defendant shall take nothing from plaintiff by reason of defendant's Cross-complaint on file herein.

10. Plaintiff is entitled to have and recover his costs of suit herein.

Let judgment be entered accordingly.

Done in Open Court this 19th day of November, 1956.

/s/ WM. C. MATHES,
Judge.

Acknowledgment of Service attached.

[Endorsed]: Lodged November 8, 1956. Filed November 19, 1956.

United States District Court, Southern District
of California, Central Division

No. 187-15 W.M.

JAMES W. HARLEY, SPECIAL ADMINIS-
TRATOR WITH GENERAL POWERS of
the Estate of DAN L. HARLEY, Deceased,
Plaintiff,

vs.

JOE GRENIER,

Defendant.

JUDGMENT

The above entitled action came on regularly for non-jury trial on October 31, 1956, before Honorable William C. Mathes, Judge of the above entitled court. Plaintiff was represented by his attorneys, Lyndol L. Young, Esq., and H. Elliot Pownall, Jr., Esq., and defendant was represented by his attorney, George Boshae, Esq. Evidence both oral and documentary was presented to the Court by the plaintiff and defendant. Having considered the evidence presented and having heard argument by plaintiff and defendant, and the Court having made its Findings of Fact and Conclusions of Law,

Now, Therefore, It Is Ordered, Adjudged and Decreed as Follows:

1. That defendant holds the title to the real property hereinafter described as trustee for the Estate of Dan L. Harley, deceased, to-wit:

The north sixteen and a half (N 16½) feet of Lot Nineteen (19) and all of Lot Twenty (20)

in Block Twenty-four (24) of the original townsite of the City of Deer Lodge, County of Powell, State of Montana, according to the official plat and survey thereof now on file and of record in the office of the County Clerk and Recorder in and for the County of Powell, State of Montana, to which plat and survey reference is hereby made for a more particular description thereof.

2. Defendant is hereby ordered and directed to execute and acknowledge the grant deed lodged with the Clerk of the Court (copy of which is hereto attached as Exhibit A and incorporated by reference herein), which grant deed conveys the above described real property to the Estate of Dan L. Harley, deceased, within 10 days from the receipt of notice by the attorney for the defendant of the signing of the Judgment herein by the Court. The Clerk shall deliver the grant deed so executed and acknowledged by the defendant to the attorneys for the plaintiff as and when the Judgment in favor of plaintiff herein shall become final.

3. Defendant is hereby restrained and enjoined from encumbering the above described real property and from transferring or assigning the title to the said above described real property to any person or party other than the Estate of Dan L. Harley, Deceased, pending the time that defendant executes and acknowledges the deed conveying the above described real property to the Estate of Dan L. Harley, deceased, and until the further order of the Court.

4. That plaintiff do have and recover judgment against the defendant in the sum of \$2,931.07.

5. Defendant shall take nothing from plaintiff by reason of defendant's Cross-complaint on file herein.

6. That plaintiff do have and recover his costs of suit herein taxed in the amount of \$.....

Let Judgment be entered accordingly.

Done in Open Court this 19th day of November, 1956.

/s/ WM. C. MATHES,
Judge.

EXHIBIT "A"

GRANT DEED

This Indenture, made the day of November, 1956, between J. H. Grenier, also known as Joe Grenier, the party of the first part and Estate of Dan L. Harley, Deceased, the party of the second part.

Witnesseth: That the said party of the first part pursuant to the Order and Judgment of Honorable William C. Mathes, Judge of the United States District Court, Southern District of California, Central Division, duly signed and entered on November, 1956, does by these presents, Grant unto said party of the second part and to its assigns forever, all that certain, piece or parcel of land, situate, lying and being in the County of Powell, and State of Montana and bounded and particularly described as follows, to-wit:

The north sixteen and a half (N 16½) feet of

Lot Nineteen (19) and all of Lot Twenty (20) in Block Twenty-four (24) of the original townsite of the City of Deer Lodge, County of Powell, State of Montana, according to the official plat and survey thereof now on file and of record in the office of the County Clerk and Recorder in and for the County of Powell, State of Montana, to which plat and survey reference is hereby made for a more particular description thereof.

Together with all and singular the tenements, hereditaments and appurtenances thereunto belonging, or in anywise appertaining, and the reversion and reversions, remainder and remainders, rents, issues and profits thereof.

To Have and to Hold, all and singular the said premises, together with the appurtenances, unto the said party of the second part, and to its assigns forever.

In Witness Whereof, the said party of the first part has hereunto set his hand and seal the day and year first above written.

.....

State of California

County of Los Angeles—ss.

On, 1956, before me, the undersigned, a Notary Public in and for said County and State, personally appeared.....
, known to me to be the person whose name is subscribed to the within

instrument and acknowledged that he executed the same.

Witness my hand and official seal.

[Seal]

Notary Public in and for said County and State.

Acknowledgment of Service attached.

[Endorsed]: Lodged November 8, 1956. Filed November 19, 1956. Docketed and Entered November 20, 1956.

[Title of District Court and Cause.]

NOTICE OF APPEAL TO COURT OF APPEALS UNDER RULE 73(b)

Notice is hereby given that Joe Grenier, defendant above named, hereby appeals to the Court of Appeals for the Ninth Circuit from the final judgment entered in this action on November 20, 1956.

/s/ GEORGE BOSHAЕ,

Attorney for Appellant Joe Grenier.

[Endorsed]: Filed December 4, 1956.

[Title of District Court and Cause.]

CERTIFICATE BY CLERK

I, John A. Childress, Clerk of the above-entitled Court, hereby certify that the items listed below constitute the transcript of record on appeal to the United States Court of Appeals for the Ninth Circuit in the above-entitled cause:

A. The foregoing pages numbered 1 to 42, inclusive, containing the original

Amended Complaint;

Answer to Amended Complaint;

Cross-Complaint;

Answer to Cross-Complaint;

Pre-Trial Opening Statement by Defendant and Cross-Complainant;

Memorandum of Law by Defendant;

Findings of Fact and Conclusions of Law;

Judgment;

Notice of Appeal;

Designation of Record on Appeal;

Appellee's Designation of Additional Portions of the Record;

Affidavit and Order Thereon Extending Time to Docket Record on Appeal;

and a full, true and correct copy of the Minutes of the Court on October 31, 1956; November 1, 1956;

B. Plaintiff's exhibits 1 through 16, inclusive, and defendant's exhibits A through I, inclusive.

C. One volume of Reporter's Official Transcript of Proceedings had on October 31, 1956.

I further certify that my fee for preparing the foregoing record amounting to \$1.60, has been paid by appellant.

Witness my hand and seal of the said District Court this 21st day of February, 1957.

[Seal] JOHN A. CHILDRESS,
Clerk,

/s/ By CHARLES E. JONES,
Deputy.

In the United States District Court, Southern
District of California, Central Division

No. 18715-WM Civil

JAMES W. HARLEY, Special Administrator with
general powers of the Estate of Dan L. Harley,
deceased,

Plaintiff and Cross-Defendant,

vs.

JOE GRENIER,

Defendant and Cross-Complainant.

REPORTER'S TRANSCRIPT OF
PROCEEDINGS

Los Angeles, California

Wednesday, October 31, 1956. 9:30 A.M.

Honorable William C. Mathes, Judge Presiding

Appearances: For the Plaintiff and Cross-
Defendant: H. Elliot Pownall, Jr., Esq., and
Lyndol L. Young, Esq., 843 General Petroleum
Building, 612 South Flower Street, Los Angeles
17, California.

For the Defendant and Cross - Complainant:
George Boshae, Esq., 608 South Hill Street, Los
Angeles 14, California. [1]*

The Court: Are there any ex parte matters?

The Clerk: No, your Honor.

The Court: Please call the calendar.

* Page numbers appearing at top of page of original Reporter's
Transcript of Record.

The Clerk: Case 18715, James W. Harley, and so forth, v. Joe Grenier.

Mr. Young: Ready for the plaintiff, your Honor.

Mr. Boshae: Ready for the defendant.

The Court: You may proceed, gentlemen. I have been over the file.

Mr. Young: Very well, your Honor.

The Court: I take it the first exhibit would be the pretrial stipulation?

Mr. Young: Yes, your Honor.

The Court: Unless you have some other order?

Mr. Young: No. We have a deed which, I believe, is the only other exhibit.

The Court: Has that been marked?

The Clerk: Yes, your Honor, a warranty deed has been marked as Plaintiff's Exhibit 1.

Mr. Boshae: I have the original, your Honor, and we will stipulate that is a duplicate, and if your Honor wishes to see the original, we have it, and then we will just leave the photostat in. [3]

The Court: Yes, you might hand it to the clerk, and I will examine it, and the clerk will deliver it, if there is no objection.

Mr. Young: No objection, your Honor.

The Court: It is stipulated that the photostatic copy is a genuine copy in all respects of what it purports to be?

Mr. Boshae: Yes, your Honor.

Mr. Young: So stipulated, your Honor.

The Court: And that it is a deed which was delivered by the grantor therein named to the grantee therein named on or about the 16th day of May, 1955?

Mr. Young: So stipulated, your Honor.

Mr. Boshae: So stipulated.

The Court: It is received in evidence as Plaintiff's Exhibit 1, and the pretrial stipulation will be Exhibit 2, if there is no objection.

Mr. Young: No objection, your Honor.

Mr. Boshae: No objection.

The Court: Received in evidence.

(The documents referred to were marked Plaintiff's Exhibits 1 and 2 and were received in evidence.)

The Court: You may proceed.

Mr. Young: Mr. Grenier.

Mr. Boshae: I will go out in the hall to see if he is there, your Honor. [4]

The Court: You may.

Mr. Boshae: I don't see him.

Mr. Young: Will he be here?

Mr. Boshae: Yes, I expect him here. Yes, I do.

Mr. Young: Mr. Edgar.

JOSEPH H. EDGAR

called as a witness on behalf of the plaintiff and cross-defendant, having been first duly sworn, was examined and testified as follows:

The Clerk: Will you state your name, please?

The Witness: Joseph H. Edgar.

The Clerk: Be seated, please, Mr. Edgar.

Direct Examination

Q. (By Mr. Young): Mr. Edgar, will you state your profession, please?

A. I am an attorney at law, admitted to practice in the State of California.

(Testimony of Joseph H. Edgar.)

Q. When were you admitted? A. 1936.

Q. Have you practiced continuously since that time?

A. I have, sir, except for the four years in the Army during World War II.

Q. When were you in the Army?

A. From 1942 to 1946. [5]

Q. And in what branch of the Service?

A. Judge Advocate General's department.

Q. Did you hold a commission?

A. Yes, sir.

Q. What was your commission?

Mr. Boshae: We will stipulate, your Honor, that the witness is a licensed attorney, licensed to practice in the State of California. On the other items, I don't think they are material, and I will make an objection on that ground.

The Court: Sustained.

Q. (By Mr. Young): Mr. Edgar, did you know Mr. Dan L. Harley during his lifetime?

A. Yes, sir.

Q. When did you meet him the first time?

A. In February of 1954.

Q. And what was the occasion of that meeting?

A. I received a letter from Attorney Edward Roberts in Youngstown, Ohio, and I knew Mr. Roberts in the Service. He wrote and told me that he was handling the estate of Fanny Harley in Ohio, that there was property here that was owned by Fanny, that Daniel L. Harley was her brother, and that he wanted me to get in touch with Mr. Harley,

(Testimony of Joseph H. Edgar.)

and that he had written Mr. Harley that I would get in touch with him, so I called Mr. Harley.

Q. Where was Mr. Harley living at that time?

A. 1330 Blossom Street, Glendale.

Q. Now, when did Mr. Harley die?

A. July 30th, 1955.

Q. Very well. From the time you made the acquaintance of Mr. Harley down to the time he passed away, did you have occasion to see him during that period? A. I did, sir.

Q. How frequently?

A. I would say about every two weeks.

Q. When was the last time you saw Mr. Harley?

A. July 16, 1955.

Q. And where did you see him on that occasion?

A. At his home.

Q. The same home where you met him?

A. Yes, sir.

Q. Now, directing your attention to the date March 22, 1955, state whether or not you had a meeting with Mr. Harley on that date, or approximately that date?

A. Is that the date a will was signed, may I ask?

Q. Yes.

A. Well, I saw him on that date, and also a few days before.

Q. Let's take the occasion of the few days before. When would that be, approximately?

A. Well, I would say two or three days probably. [7]

Q. Who was present at that meeting?

(Testimony of Joseph H. Edgar.)

A. Mr. Harley, Mr. Grenier, — that is Daniel Harley and Mr. James Harley.

Q. Yes. Daniel is the decedent?

A. Yes, sir.

Q. And Mr. James Harley is his nephew, and the plaintiff in this action? A. Yes, sir.

Q. And did a conversation take place at that time?

A. Yes, sir, there was a conversation.

Q. Will you state the conversation, please?

A. There was a conversation with reference to Mr. Daniel Harley making a will. The various provisions that were to go in the will were discussed, and among them—well, as to who the beneficiaries would be under the will.

He told me what he wanted to put in the will. We discussed various points. One of them was with reference to what he was going to do with respect to Mr. Joe Grenier.

Q. Was Mr. Grenier present during this conversation you are now relating? A. Yes, he was.

Q. Very well. Go ahead with the conversation.

A. Well, I don't remember without having the will the exact way he wanted his property left at this time, because there were other wills, but there was conversation as to what [8] he wanted to do with respect to Mr. Grenier.

Q. Yes. That is what we are interested in.

A. All right. Mr. Harley said that he would like to do something for Mr. Grenier, and leave him something. He said he had always been a good

(Testimony of Joseph H. Edgar.)

friend of his, and he wanted to remember him, and he said he would like to leave him one-half of the Montana property.

James Harley was there at the time, and when Dan made the remark that he wanted to leave Mr. Grenier one-half of the Montana property, Mr. Grenier said, "I don't want anything." He said, "I have plenty of money. I don't need it. I don't want to receive the property."

I think I made the statement, "Well, Joe, Mr. Harley has always told me what a good friend you were of his, and he wants to leave you something."

And I turned to Jim Harley, and I said,—oh, he said he wanted to leave the other half to Jim Harley of the Montana property, and I turned to Jim, and I said, "You live down here. Mr. Grenier lives in Montana," and I said, "It is rental property. It would be good to have somebody on the ground who lives there, and can look after the interests of the property, to see that it is repaired, the taxes are paid, the rents collected, and that the property is kept rented."

And Mr. Harley agreed, — Jim Harley agreed with that statement. [9]

Mr. Boshae: To which I object as calling for a conclusion.

The Witness: Mr. Harley said, "That's right."

And that was the substance of that conversation.

The Court: When did that conversation occur, Mr. Edgar?

The Witness: That, your Honor, was just shortly

(Testimony of Joseph H. Edgar.)

before this will was drafted and signed. I believe the date was March 22, 1955.

Q. (By Mr. Young): Subsequent to this conversation, was a will prepared? A. Yes, sir.

Q. And was that provision inserted in the will?

A. Yes, sir.

Mr. Young: We have that will here, your Honor. The original has been filed in the County Clerk's Office, and we have subpoenaed the file.

Counsel, do you make any point on the——

Mr. Boshae: No. I would like to have it offered by reference, in any event, your Honor, or if you have a copy——

The Court: It is a record of another court. Do you have a copy?

Mr. Boshae: I have a copy here, your Honor, which I prepared myself, if counsel wants to look at it.

Mr. Young: I have a copy of it, I believe, and unless you make a point of it,—— [10]

Mr. Boshae: I am not making a point as to its being a copy.

The Court: I suggest you agree upon a copy, and offer the copy in evidence.

Mr. Boshae: May I see your copy, Mr. Young, and if it is the same as this, we will stipulate.

The Court: If you agree upon that, can you agree that the will was in effect——

Mr. Young: There were two other wills.

The Court: ——when Dan Harley died?

Mr. Boshae: It was in existence, your Honor.

(Testimony of Joseph H. Edgar.)

Now, the effect of it I don't know. I think the effect of it is now being contested, or will be, in the state courts.

The Court: Can you agree that it has not been revoked?

Mr. Boshae: It has not, that I know of.

The Court: It has not been revoked in whole or in part?

Mr. Boshae: We will stipulate, your Honor, that this is a photostatic copy of the original.

The Court: Then may it be stipulated, in addition to this being a true copy, the document now handed to the clerk being a true copy of the will referred to by the witness, that this will had not been revoked in whole or in part at the time of the death of Dan L. Harley?

Mr. Young: Your Honor, it had been revoked by two subsequent wills. [11]

Mr. Boshae: Well,—

The Court: Then that is not the fact, that I suggested.

Mr. Boshae: One of the wills, your Honor, has apparently not been admitted to probate, which was executed subsequent to that. In other words, there was a March will, an April will, and a July will.

The Court: Very well. I just misapprehended the facts.

Then pursuant to the stipulation, this will that is now offered will be received in evidence as Plaintiff's Exhibit—

Mr. Young: 3, isn't it, counsel?

(Testimony of Joseph H. Edgar.)

The Court: —3, Mr. Clerk?

The Clerk: Yes, your Honor.

(The document referred to was marked Plaintiff's Exhibit 3, and was received in evidence.)

The Court: You had better let the clerk have it, Mr. Young. He hasn't marked it yet.

Mr. Young: All right, your Honor.

The Clerk: Shall I place it before the witness?

Mr. Young: Yes, please.

Q. (By Mr. Young): Mr. Edgar, is Plaintiff's Exhibit No. 3 a photostatic copy of the will of March 22, 1955, that has been referred to?

A. Yes, sir.

Q. Will you refer to the provision in that will with reference to the Deer Lodge, Montana property? [12]

The Court: Isn't it apparent?

Mr. Young: It is, your Honor, yes.

The Court: It speaks for itself, doesn't it?

Mr. Young: That is right, your Honor.

Q. Subsequent to the execution of the will, Plaintiff's Exhibit No. 3,—

Mr. Boshae: Is that 3, your Honor, or is it 2?

The Court: 3. The stipulation of facts is Exhibit 2.

Mr. Boshae: I see.

Q. (By Mr. Young): —did you prepare another will for Mr. Harley, Dan L. Harley, or was one prepared under your supervision?

A. I would say that I did not actually draft the

(Testimony of Joseph H. Edgar.)

will. The will was drafted by an attorney, Louis Thompson. I was——

Mr. Boshae: To which I object as calling for a conclusion, your Honor, unless there is a proper foundation laid.

Mr. Young: Very well.

Q. Did you talk to Mr. Dan L. Harley after the will of March 22nd, Plaintiff's Exhibit 3, was executed, about another will, a new will?

A. Yes, sir.

Q. What conversation did you have with him, and solely with reference to the Deer Lodge property and Mr. Grenier?

A. The conversation about the Deer Lodge property, and what he wanted—how he wanted to dispose of the Deer Lodge property? [13]

Q. Yes.

A. He stated that he wanted to dispose of it one-half to Joe Grenier, and one-half to James Harley.

Q. That was the same provision that was contained in the March 22nd will? A. Yes, sir.

Q. All right. Now, during the time that you have indicated that you were seeing Mr. Harley, were you his attorney? A. Yes, sir.

Q. Did he confer with you about his legal matters? A. He did.

Mr. Boshae: Just a moment. Your Honor, I am going to object to the compound question. The first question that was propounded calls for a conclusion.

(Testimony of Joseph H. Edgar.)

The Court: Overruled.

The Witness: I considered myself to be his attorney and——

Mr. Boshae: To which I object as calling for a conclusion.

The Witness: ——and an adviser.

Mr. Boshae: Just a moment. I make a motion to strike, your Honor.

The Court: Motion denied. He is stating his understanding. [14] He may state his understanding of what the relationship was. Of course, it is a conclusion, but he may state it.

Mr. Boshae: I submit, your Honor, that the conversations are the basis on which an understanding may be had.

The Court: You may cross examine on it, if you wish, Mr. Boshae, if there is any issue about it.

Mr. Young: It is preliminary.

The Court: If a man draws a will for another man,——

Mr. Boshae: I don't think there is any evidence, your Honor.

The Court: ——he may say he is the man's attorney, at least at that time.

Mr. Boshae: I don't think he drew a will, your Honor.

The Court: He says he did, as I understand it. Didn't you draw Exhibit 3?

The Witness: I did not draft it, sir. I got the terms from Mr. Harley, and another attorney in

(Testimony of Joseph H. Edgar.)

the same office that I am in actually, in conference with me, set up the formality of the will.

The Court: Did the other attorney do it under your direction?

The Witness: Yes, sir. He and I worked together on it.

The Court: Proceed.

Q. (By Mr. Young): Subsequent to April 7th, did Mr. Harley ever at any time request you to draw a deed conveying [15] the Montana property to Mr. Grenier? A. No, sir.

Q. When did you for the first time discover, if you did, that such a deed had been signed by Mr. Harley?

A. On or about June 18, 1955.

Q. And state the circumstances with reference to your discovery of that fact?

A. In the afternoon on that date, or about that date, I was at Mr. Harley's home at 1330 Blossom Street, and Mr. James Harley was there, and at that time Mr. Daniel Harley told both of us that he had deeded the property to Joe Grenier.

In the same conversation he told us that he had given his 1950 Chevrolet Bel-Air to a practical nurse he had, Mrs. Studebaker, and he also told us he had given Mrs. Studebaker the television set that he had.

Q. Subsequent to the conversation that you had with Mr. Grenier about the Deer Lodge property, around March 20, 1955, did you have occasion to see him again? A. Mr. Grenier?

(Testimony of Joseph H. Edgar.)

Q. Yes.

A. I never had a conversation at that time with Mr. Grenier. It was with Mr. Harley.

Q. Mr. Grenier was present, as I understood you.

A. No, no. Mr. James Harley and I were present [16] at the June conversation.

Q. No, I am talking about the March 20th conversation. A. Oh, I beg your pardon.

Mr. Boshae: May I get it straight: Was that June 16th?

The Witness: I said on or about June 18th, counsel.

I am sorry, I missed the question.

Q. (By Mr. Young): That is all right. Do you understand the question?

A. No, sir, I do not.

Q. You related a conversation that you had with Mr. Dan L. Harley on or around the 20th of March, or the 22nd of March, 1955, when Mr. Grenier was present. A. Yes, sir.

Q. When there was a discussion about the Deer Lodge property. A. Yes, sir.

Q. Do you recall that testimony?

A. Yes, sir.

Q. Now, after that date, did you have occasion to see Mr. Grenier again?

A. I saw him again—I couldn't say whether I saw him between that conversation and July 16, 1955, or not, but I saw him on July 16, 1955.

(Testimony of Joseph H. Edgar.)

Q. All right. Now, where did you see Mr. Grenier on July 16, 1955? [17]

A. At 1330 Blossom Street.

Q. And who all was there? Who else was present?

A. Mr. Daniel Harley was there, Mr. Grenier was there, and I was there.

Q. Did you have a conversation at that time with Mr. Grenier—— A. I did.

Q. ——with reference to the Deer Lodge, Montana property? A. I did, sir.

Q. All right. State that conversation.

The Court: Was it in the presence of Dan L. Harley?

Mr. Young: Yes, Dan L. Harley. I understood he was there.

The Court: Is that correct?

The Witness: Yes, sir. Do you want the whole conversation that took place that day?

Q. (By Mr. Young): Yes, state the conversation.

A. Well, Mr. Grenier said that he understood—he told me, he said, “I understand that Jimmy Harley has been out to see Dan, and that he has talked to Dan about having a guardian appointed for him.”

He said, “Dan doesn’t need a guardian.” He said he has—he said, “If he does have one, it isn’t going to be Jimmy Harley.” He said, “I am perfectly capable of taking care [18] of Dan’s affairs.” He said, “I have a power of attorney from Dan.” He

(Testimony of Joseph H. Edgar.)

said, "I am paying the bills." He said, "I have—the accounts are in joint tenancy." He said, "I am taking care of all of the bills."

Q. What accounts did he refer to?

A. The bank accounts.

Q. Very well.

A. I said to him—I don't know whether this was in sequence, but, anyhow, Dan was lying on the couch, and had been confined either to the couch or bed for some time, and so I said to him, "What is going to happen to those bank accounts when Dan dies? They are in joint tenancy, and," I said, "under the law they will go to you."

He said, "Just as soon as an executor is appointed for Dan's estate," he said, "I am going to turn those accounts over to him."

The Court: Who said that?

The Witness: Mr. Joe Grenier.

So to go back to the conversation, when the discussion about Jim Harley being appointed his guardian took place, he said, "Jim Harley has always"—he says, "is hardly more than a stranger to Dan, and he isn't going to be his guardian." He said, "Isn't that right, Dan?"

And Dan said, answered the question, "Yes."

Then I said to Mr. Grenier, I said, "I understand that [19] Dan has also deeded the Montana property to you."

He said, "That's right."

I said, "What is back of that? Does he intend

(Testimony of Joseph H. Edgar.)
to avoid the Tessie Harley will contest by doing that?"

He said, "That is right."

Q. (By Mr. Young): That is what Mr. Grenier said?
A. Yes, sir.

The Court: Did all this occur in the presence of Dan Harley?

The Witness: It did, your Honor.

The Court: Within his hearing?

The Witness: Yes, your Honor.

The Court: How old a man was he at that time?

The Witness: I am not sure of his exact age, but I would say around 77 or 78.

The Court: What was his apparent physical condition, as it appeared to you at that time?

The Witness: It appeared very poor, your Honor.

The Court: What did he appear to be suffering from?

The Witness: Well, for one thing, he had a very large hernia, which he showed to me on occasion, because he most often was in his pajamas and bathrobe when I would see him. He didn't show it to me exactly. He showed it to me through his pajamas, and would complain of pain.

Also, his ankles were very swollen. I would say [20] almost from the time that I knew him or met him in February of 1954, he was extremely thin. It was—actually, I think it would be an honest description to say that it was almost like a skeleton, with the skin over it. He in his youth had had an injury to his hand while working—

(Testimony of Joseph H. Edgar.)

Mr. Boshae: Just a moment. Your Honor, I am going to object to what he had in his youth.

The Witness: I will take that back, your Honor. His hand was deformed from some sort of injury. I think two fingers were missing, but he could hold a cigarette in that hand, however.

The Court: Which hand was that?

The Witness: I wouldn't want to say, your Honor. As it comes back to me, I am quite sure it was his left hand, because he could write, and did write right-handed, as I remember it.

He often said to me that he didn't expect to live much longer. This was after his wife had passed away in March, around March 20th, or March—yes, March 20th, of 1955, and toward the end he used a wheelchair, I know, that is, he was pushed in a wheelchair by the practical nurse.

On occasion he did complain that he couldn't see too well. He also complained of shortness of breath, and also told me that he had to have pillows under him when he slept because of shortness of breath, and I know that he, toward [21] the end, would always lie with pillows under his back.

The Court: Did he appear to hear all right?

The Witness: I would say that he heard all right, your Honor.

The Court: Your next question.

Q. (By Mr. Young): With reference to the period, say, two months prior to the time he passed away, did you ever make any observation with reference to the use of oxygen by him?

(Testimony of Joseph H. Edgar.)

A. I never saw him use the oxygen, Mr. Young.

Q. Very well. Now, when did you see Mr. Harley the last time, Dan L. Harley?

A. July 16, 1955.

Q. Did you make any observation at that time with reference to his mental alertness?

A. Yes, sir, I observed his mental condition.

Q. Well, let's go back to March 20th, when his wife died, and down to the last time you saw him, did you notice any change in his mental condition?

Mr. Boshae: Just a moment. Your Honor, I think that question is speculative, and I don't think it calls for a proper observation, as to whether there was any change. I object.

The Court: Yes, it involves two appraisals, one at the beginning and the other at the end of the period, and the [22] deduction as to what occurred in between.

Mr. Young: Very well, your Honor.

The Court: Why don't you go at it in sequence?

Mr. Young: Yes, I will.

Q. On March 20, 1955, what observation, if any, did you make with reference to the mental condition of Mr. Dan L. Harley?

A. I would say that it was satisfactory, all right. I mean I saw no——

The Court: You mean as to whether or not it was sound or unsound?

Mr. Young: Yes, sound or unsound.

The Witness: I would say it was sound.

Q. (By Mr. Young): All right. Now, subse-

(Testimony of Joseph H. Edgar.)

quent to March 20, 1955, state whether or not you observed any change in his mental condition over what you described it to be.

Mr. Boshae: To which I object, your Honor, on the ground it is speculative, and calls for a conclusion.

The Court: Sustained. I suggest you develop as to other observations he may have made at a later time.

Mr. Young: Very well.

Q. On the 18th of June, when you saw Mr. Harley and discussed with him, or he stated to you he deeded the Montana property to Mr. Grenier, did you make any observation at that time with reference to his mental condition, as to its soundness or unsoundness? [23]

A. I would say that—I don't know whether it was what he told me——

Mr. Boshae: Just a moment. Your Honor, I don't think that is responsive up to this time.

The Witness: Yes, sir, I did.

Q. (By Mr. Young): All right. State what you observed.

A. I don't know whether I was influenced by what he told me he had done, or whether it was a true observation, but I——

Mr. Boshae: Just a moment. Your Honor, I make a motion to strike that part of his answer as not responsive and calling for a conclusion.

The Court: Is it still in the California Code that the person who is not the questioner can object

(Testimony of Joseph H. Edgar.)

upon the ground that the answer is not responsive?

Mr. Boshae: I did not get the comment, your Honor.

The Court: In this court I never permit a person other than the interrogator to object that an answer is not responsive. You might object that it is incompetent, irrelevant and immaterial, or hearsay, or some other ground. But, of course, this is a diversity case, so I like to try a diversity case as much as possible like it would be tried in the Superior Court, where this case belongs,—

Mr. Boshae. That is correct, your Honor. [24]

The Court: —so if the Superior Court would rule that the objection of non-responsiveness is available to anyone but the questioner, I will so rule.

Mr. Boshae: Your Honor, it has been my understanding that they have so ruled, at least,—

The Court: Several years ago, what I call the logical rule used to be in force, but then some legislator-attorney was apparently disappointed because he could not object because of the ground of non-responsiveness, so he put a bill through the Legislature to make it the ground of an objection. If what the witness says is competent evidence, what difference does it make whether the questioner asked him the right question to elicit it or not?

Mr. Boshae: Then I will make the objection on the ground it is incompetent, irrelevant and immaterial. If your Honor would prefer to read back that part of it, I think it is obvious that it is.

The Court: What part are you referring to now?

(Testimony of Joseph H. Edgar.)

Mr. Boshae: May I ask the court reporter to read it back, please?

The Court: Yes, please.

(The answer referred to was read as follows:

“A. I don’t know whether I was influenced by what he told me he had done, or whether it was a true observation, but I——”) [25]

The Court: Up to that point the answer may be stricken, if you so move.

Mr. Boshae: Thank you, your Honor.

Q. (By Mr. Young): Now, Mr. Edgar, with the question in mind, I believe you may now state what your observation was.

A. My observation on June 18, 1955, was that I did not feel that he was as mentally alert as he had been in the past.

Mr. Young: Now, Mr. Edgar, you have related a conversation while Mr. Grenier was there. I will withdraw that question.

Cross examine.

Cross Examination

Q. (By Mr. Boshae): Now, Mr. Edgar, I think you stated on direct examination that you were the attorney for Mr. Harley, is that your understanding?

A. Well, yes, I was his adviser on legal affairs. I originally was the administrator of his sister’s estate.

Q. That had nothing to do directly with him, did it?

A. No. He had requested me, because of his

(Testimony of Joseph H. Edgar.)

wife's health, and also because he said he was not well, to relieve him of the responsibility of being the executor, which he [26] was named in Fanny Harley's will, and so I was the administrator of the estate, and in conjunction with meeting with him in that capacity, and reporting to him what was being done, he also came to discuss legal matters of his own with me.

He referred to me as his attorney when we would talk about his problems.

Q. Now, isn't it true, Mr. Edgar, that you—in the original acquaintance with Mr. Harley, that you were referred to him by an attorney in Ohio, and he did not come to you first; isn't that correct?

A. That is right.

Q. And you went to his home and told him that you had been referred to him by an attorney in Ohio, with reference to the handling of an estate here of his deceased sister; isn't that correct?

A. No, sir. I first called him by telephone, and told him that Mr. Roberts had written to me to get in touch with him, and his remark to that was, he said, "I am certainly glad to hear from you." He said, "I have been wanting to hear from you, and been expecting to hear from you."

Q. Now, you knew that there were guardianship proceedings that were initiated and tried and concluded in April of 1955, did you not?

A. Yes, sir. [27]

Q. Did you handle that for Mr. Harley?

A. I was not the attorney of record, but I

(Testimony of Joseph H. Edgar.)

worked with the attorneys of record in connection with the case.

Q. You did not appear as attorney of record in court in his behalf either, did you?

A. No, sir. I was present in court, but I was not the attorney of record.

Q. And is it not true, Mr. Edgar, that at that time he was declared competent?

A. That is right.

Q. Now, at any time after you were told that the deed was given to Mr. Grenier by Dan Harley, did you ever take any legal proceedings at any time to cancel that deed during his lifetime?

A. No, sir.

Q. As a matter of fact, Mr. Grenier told you that he had recorded the deed, didn't he?

A. No, sir. May I qualify that: If he did, I have forgotten that he told me.

Q. You don't recall whether he did or not?

A. No, I couldn't say, and I might say—you asked me if I took any legal proceedings to cancel the deed. I did not personally, but I took Mr. Jim Harley to Mr. Lyndol Young's office, and introduced him to Mr. Lyndol Young.

Mr. Boshae: Just a moment. I am going to make a motion [28] to strike the latter part of that answer as irrelevant, incompetent and immaterial.

Mr. Young: Your Honor, he opened the subject matter himself.

The Court: And as not responsive?

Mr. Boshae: Yes, your Honor.

(Testimony of Joseph H. Edgar.)

The Court: The objection is good as to you.

Mr. Boshae: Yes, sir.

The Court: Sustained upon the latter ground.

Mr. Boshae: And, also, upon the ground it calls for hearsay.

The Court: Put your next question, or do you wish a further answer to this pending question?

Q. (By Mr. Boshae): Now, Mr. Edgar, did you ever discuss any of Mr. Harley's financial affairs with him? A. Yes, sir.

Q. Did you know that he was handling his finances in collaboration with Mr. Grenier?

Mr. Young: I object to that as calling for a conclusion of the witness, what his finances were.

The Court: It assumes a fact not in evidence, doesn't it?

Mr. Boshae: I think it has been asked and answered, your Honor. If I might say, I think the objection came a little bit too late. [29]

The Court: Sustained.

Q. (By Mr. Boshae): Did you know that he was handling his financial affairs, or that he was writing checks and handling the bank account in collaboration with Mr. Grenier? A. Yes, sir.

Q. And you knew, as a matter of fact, that he was writing checks as late as July, didn't you?

Mr. Young: Who?

Mr. Boshae: Mr. Harley.

The Witness: I don't believe I knew that. I don't think I ever saw him write any checks in July.

(Testimony of Joseph H. Edgar.)

Q. (By Mr. Boshae): Do you know whether or not, of your own knowledge, that he wrote any checks in July of 1955?

A. Not directly. I do by hearsay.

Mr. Boshae: I have no further questions, your Honor.

The Court: Any redirect?

Mr. Young: May I ask another question, your Honor?

The Court: You may.

Redirect Examination

Q. (By Mr. Young): Mr. Edgar, you referred on your direct examination to a conversation that you had with Mr. Grenier in July about the property in Montana, the deed to the property?

A. Yes, sir. [30]

Q. What, if anything, during that conversation did he say with reference to consulting an attorney about drawing that deed?

A. When he told me that, or answered the question, "What is back of Dan deeding you the Montana property, does he hope to avoid the Tessie Harley will contest by doing it?" and he replied, "Yes," I then said, "You know there are a lot of legal problems to be considered in making a deed of that type, such as gift tax."

In answer to that, he said, "Don't you worry. I have legal advice concerning that." He said, "Do you know Carl Sturzenacker?"

I said I had heard his name.

(Testimony of Joseph H. Edgar.)

He then went on to say, "I am on the Board of the National Retail Liquor Dealers Association," and as I understood, at least it is my recollection he said that Mr. Sturzenacker was their attorney.

Q. Does that cover the conversation?

A. That is as near as I can remember it.

Mr. Young: That is all.

Mr. Boshae: I have no further questions.

The Court: You may step down, Mr. Edgar.

(Witness excused.)

The Court: Your next witness.

Mr. Young: Mr. Grenier. [31]

Your Honor, I took this matter up with counsel, and he said Mr. Grenier would be here. I told him I wanted to put him on the stand.

Mr. Boshae: I expect him here.

Mr. Young: Oh, you do?

Mr. Boshae: But, obviously, he is not in the courtroom.

Mr. Young: I told counsel I wanted to put him on the stand as my first witness, and he said it would not be necessary to subpoena him, he would be here.

Mr. Boshae: He will be here, counsel. I expected him here at 9:30, your Honor.

The Court: Call another witness.

Mr. Young: Dr. Steelman.

Your Honor, may Mr. Edgar be excused?

Mr. Boshae: So far as I am concerned, yes.

The Court: He may be excused.

DR. STUART P. STEELMAN

called as a witness on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: Will you state your name, please?

The Witness: Dr. Stuart P. Steelman, O.D.

The Clerk: S-t-u-a-r-t, is it?

The Witness: Yes.

The Clerk: Be seated, please. [32]

Direct Examination

Q. (By Mr. Young): State your profession, Doctor, please. A. Optometrist.

Q. Where did you go to school?

A. I went to U.S.C., and I was graduated in 1939.

Q. When were you admitted to practice your profession in California?

A. About two months later. After I passed my California State Board examination, I got notice that I passed.

Q. And have you practiced your profession since that time up to the present time?

A. Yes, with the exception of between 1943, November 2nd, to May 19, 1946. I was in the Army for that time, for two years and nine months.

Q. Where did you maintain your offices?

A. With my father, at 123 South Brand Boulevard.

Q. Did you know Dan L. Harley during his lifetime?

A. Yes, I knew him very well.

(Testimony of Dr. Stuart P. Steelman.)

Q. When did you meet him the first time?

A. The first time I met Mr. Harley was about October of 1949, when he first came in to have his glasses adjusted by me.

Q. Subsequent to that day, did you have occasion to see him again? [33]

A. You mean afterwards?

Q. Yes, afterwards.

A. Yes, I saw him many times after that time. About three months after that I examined his eyes and sold him a pair of reading glasses. That was about the first part of 1950.

Mr. Boshae: Doctor, will you kindly speak a little louder?

The Witness: Yes, I will be glad to.

Mr. Boshae: Thank you.

The Witness: All right. Then I got acquainted with his wife shortly after that, as a result of selling him his reading glasses in the first part of 1950. Anyway, I sold him another pair of glasses, of reading glasses in 1953, around about August, 1953.

Q. (By Mr. Young): When you first met Mr. Harley, did you make any observation as to his physical condition?

A. Yes, I did. I made the notation myself that he was very spry, very alert, because he and my dad used to kid each other about being so alert at their respective ages, being in their seventies.

Q. When was the last time you saw Mr. Harley alive?

(Testimony of Dr. Stuart P. Steelman.)

A. The last time I saw Mr. Harley alive was approximately June 8, 1955, when one of my girls said that Mr. Grenier had made an appointment for Mr. Harley to be examined [34] for his eyes, to have his eyes checked over.

And at the time that the appointment came around, why, the front door opened, and my father and I and one blonde girl in the office named Fay Thompson saw Mr. Grenier wheel Mr. Harley in in a wheelchair, come in through the front door in a wheel chair.

As he brought him into the refracting room, Mr. Grenier and I helped Mr. Harley off the chair into the refracting chair. At that time I noticed he was in very bad physical shape. He reminded me of some of these pictures of these war prisoners out in Japan, where the——

Mr. Boshae: Just a moment. I am going to object to that as immaterial, irrelevant and incompetent, your Honor, and no proper foundation for these statements.

The Court: What it reminded you of is not material.

The Witness: I am sorry about that.

The Court: But, Doctor, however he appeared to you from your observation or your examination, you may state.

The Witness: That was the first experience in human life I ever saw a person in that bad a shape, so I remember it very vividly. Anyway, Mr. Grenier and I helped him into the chair. Each of us got

(Testimony of Dr. Stuart P. Steelman.)

an arm, and helped him into the chair, and it was a dead weight of approximately 85 pounds, I would judge.

Q. (By Mr. Young): Did you make an examination of him? [35] A. Yes, I did.

Q. What did you do?

A. It wasn't a complete examination, because the man was in such poor condition, I couldn't. I couldn't do a complete examination on him as I had always done in the past.

I took an examination of his vision, which was spasmodic. He couldn't interpret what I was trying to ask him. I had to hold his head many times to look at the letters on the wall, and I was getting pretty discouraged, because he couldn't seem to concentrate on what I was trying to have him do, in looking at the letters on the wall, before I proceeded to examine his eyes for the reading glasses.

Q. Did you reach an opinion with reference to the condition of his vision at that time, say, to read, —to read the newspaper?

A. Yes, on my little instrument that I have, it has a large—it has a card with different size letters. He couldn't read the standard size letters, even with his prescription in place, so I had him read the bigger ones, and even then he couldn't seem to understand what I was talking about. Now, whether he couldn't read it, or whether he couldn't comprehend what I was trying to ask him, I don't know, but I got the impression that he couldn't read hardly at all; even with the correction in

(Testimony of Dr. Stuart P. Steelman.)

place, the very best correction in place, that I had for him for reading. [36]

Q. At the conclusion of your examination, was he taken out of the chair and put back in the wheelchair?

A. Yes, Mr. Grenier and I helped him off the chair, and back into this collapsible, or whatever it was, it was a regular lightweight wheelchair. And to start with, Mr. Harley recognized me when I saw him the last time, but I was very discouraged, because he had always been so alert and so up on his toes.

Mr. Boshae: Just a moment. Your Honor, I am going to object to that portion of the answer as irrelevant, incompetent and immaterial.

The Court: Will you rise, please, when you address the court, and state it so I can hear you?

Mr. Boshae: I am sorry I make a motion to strike the answer, and object on the grounds it is irrelevant, incompetent and immaterial, as to how this man felt, that is, that he was discouraged, or whatever it was that he said.

The Court: The objection is sustained.

Mr. Boshae: Thank you.

The Court: It is immaterial how you felt about it, Doctor.

The Witness: Yes, I realize that; just as a friend.

The Court: Except as he appeared to you, that is it. Anything you perceived with your senses with respect to his condition, you may state. [37]

(Testimony of Dr. Stuart P. Steelman.)

The Witness: I see.

Q. (By Mr. Young): Go ahead. You may state.

A. I was going to say that I am trying to recall,—I don't remember whether Mr. Harley told me he had a stroke, or whether Mr. Grenier said he had a stroke just recently, but, anyway, it came to my attention that he had just had a heavy stroke, within three or four weeks before the time he was wheeled in, and the impression I got at the time why was the man brought in in such poor shape, was something trying to be proved.

Mr. Boshae: Again, your Honor, I make the objection and move to strike the answer.

The Court: That portion of it beginning with the impression may be stricken.

Be specific, Mr. Boshae. If you make a motion to strike the answer and a part of it is good, I will deny the motion.

Mr. Boshae: That portion of the answer commencing with the word "impression," your Honor.

The Court: Motion granted.

Q. (By Mr. Young): Doctor, on the occasion of June 8th, when Mr. Harley was in your office, did you form an opinion as to any change that you observed with reference to his mind, the alertness,—

A. Well, he wasn't the same.

Q. —from the time you first met him? [38]

Mr. Boshae: I am going to object, your Honor, on the ground it is irrelevant, incompetent and immaterial, and the answer is speculative, and there has been no proper foundation.

(Testimony of Dr. Stuart P. Steelman.)

The Court: I suggest that you take it by stages, Mr. Young.

Mr. Young: Very well.

Q. When was the first time you met Mr. Harley?

A. It was around about November of 1949.

Q. What was his condition and appearance at that time?

A. At that time he was in marvelous health, and by his walk you would say the man was in fine health, that he had a keen mind, and everything about him was very sharp and alert, and I admired the man because of that point. I had on the card——

The Court: I think you have answered the question. You say he was 72 at that time?

The Witness: I would say he was about 72 or 73. I had on the card, when I first wrote his age down on the card, which was about two or three months after that, about the first part of 1950.

Q. (By Mr. Young): All right. On June 8th, when you made the examination, when Mr. Grenier was there, did you make any observation as to any change with reference to his mind or his alertness?

A. Yes, I did.

Mr. Boshae: Just a moment. Your Honor, I am going to object.

The Court: Leave out the change, and we will get along. Don't ask him about the change. Just ask him how he appeared to him.

Mr. Young: All right, your Honor.

Q. What did you observe?

(Testimony of Dr. Stuart P. Steelman.)

A. I observed there was a definite change in the man.

Mr. Boshae: To which I am going to make a motion to strike the answer, your Honor, as irrelevant, incompetent and immaterial.

The Court: The question is: What did you observe as to whether or not he was alert, or otherwise?

The Witness: I observed——

The Court: Is that what your question is?

Mr. Young: Yes, your Honor.

The Witness: My observation was the man was of a very white, chalky face feature. He was run down physically, I mean, that I noticed. His eyes had a glassy stare. He reminded me, typically, of a year and half before that, of my uncle who had three strokes and looked the same way.

So I said to myself, "Here is another typical"——

Mr. Boshae: Just a moment, your Honor.

The Court: Not what you said to yourself. [40]

The Witness: All right. Then I won't say.

Mr. Young: What you observed.

The Witness: Anyway, the symptoms looked very similar to what I had seen beforehand of a typical heavy-stroke case.

Mr. Young: Cross examine.

Cross Examination

Q. (By Mr. Boshae): Dr. Steelman,——

A. Yes, sir.

(Testimony of Dr. Stuart P. Steelman.)

Q. —is it your testimony that you saw Mr. Harley wheeled into your office?

A. Is it my testimony alone, or somebody else's, too?

Q. No, yours. Is that your testimony,——

A. Yes.

Q. —that you actually saw him wheeled into your office?

A. Yes, that's right, definitely.

Q. Do you recall my seeing you on or about the first part of October, at your office?

A. Yes, I remember, yes.

Q. And do you recall my question to you, whether or not when you first saw Mr. Harley,—when you first saw him when he came in the last time? A. Yes, I do. [41]

Q. And do you recall your telling me that you did not see him come in, that you were in your back office working?

A. No, I did not say that.

Q. You did not say that? A. No, no.

Q. And don't you also recall—— A. No.

Q. —that you don't recall his first coming in, and the first time you saw him was when he was in a wheelchair in your office, sitting in the reception room?

A. No, that wasn't the right words, no.

Q. You say that is not correct?

A. I turned the light on in my hallway to see who was coming in, because I wanted to greet him. So I saw him coming through the front door, but

(Testimony of Dr. Stuart P. Steelman.)

I was still standing back at the entrance to my test room, which was about—oh, I would judge about 50 or 60 feet away, but I saw Mr. Grenier wheeling him in through the front door at that distance.

Q. Now, is it your testimony that Mr. Harley couldn't see, at the time that you examined him?

A. When I got through with my examination, I was of the opinion that he was seeing very poorly.

Q. It isn't your testimony that he could not see at all; is that correct?

A. I would not say couldn't see at all; not as a blind man, no. [42]

The Court: You say "very poorly." What do you mean? Could he read a newspaper?

The Witness: I gave him, your Honor, a chart to read for close up, and the letters start very large from the top and graduate down to smaller sizes at the bottom.

I had him start to try to read the small print at the bottom, as he had always done before with his correction in place, and he couldn't make out, and then I had him start reading at the top, and he couldn't read very much, and which is mighty large for a prescription reading, and he stumbled very much in reading from the top to start with.

The Court: From your observation of him at that time, do you have an opinion as to whether or not he would have been able to read the newspaper, as an individual normally reads a newspaper?

(Testimony of Dr. Stuart P. Steelman.)

The Witness: I would not say so efficiently, your Honor, no.

The Court: Could he read it at all?

The Witness: No. He mumbled incoherently.

The Court: I am talking about his vision now.

The Witness: Yes. I mean when I asked him——

The Court: He doesn't see with his mouth. I am talking about his vision.

The Witness: As a rule, I have to ask a man if he can read. I asked him to read, but he wouldn't even start reading. [43] He mumbled something incoherently, and wasn't reading, but he heard me distinctly, because his hearing was still all right.

The Court: I am talking about his ability to read. Did he have the ability to read the morning paper, like you read the morning paper that morning?

The Witness: I wouldn't say so, no, sir.

The Court: Or any part of it?

The Witness: No, sir.

Q. (By Mr. Boshae): Would your answer be the same if he was with or without glasses, Doctor?

A. Well, I would say from what it was, as I recall, when I started having him read there——

The Court: Oh, I intended to ask you, and my question presupposed, if I didn't say so, that he had his glasses on, of course.

The Witness: Oh, yes, yes.

The Court: Did you also so understand my question?

The Witness: Roughly, I did, your Honor. But

(Testimony of Dr. Stuart P. Steelman.)

I would say in there, of course, I endeavored to try to have him read the large letters without glasses in place, or the correction in place, and I never do that, but I suppose he couldn't see quite as good then, but even with the correction in place, even with the large letters, he wasn't even cognizant then to know what to read then. [44]

So when I got all through, I told Mr. Grenier, and I said, "Well, the man's glasses I sold him two years and a half ago are still okay, the best obtainable," and I said, "There is nothing else to improve them."

As I recall, I said that I could not improve them, "That they are still as good as anything that could be done."

So I would say that the man was not reading efficiently, so as to see with the correction in place, where he had always done it before very efficiently.

Q. (By Mr. Boshae): Would you say, in your opinion, that he could not read subsequent to that time, or he would not be able to read subsequent thereto?

A. Well, I would say the last time I saw Mr. Harley, when he came to me to adjust his glasses prior to his wife passing away, he would say, "Doc, let me look at some fine print. I want to see if with my glasses I can still read good." And I gave him my chart, my little handbook, and he read it down to the small print. That, as I recall, was about three or four months before his wife passed away. He told me she was dangerously sick. So at

(Testimony of Dr. Stuart P. Steelman.)

that time I remember very distinctly he could read the small print.

Q. I am talking about after the last examination, Doctor, in your opinion. A. Yes, sir.

Q. Would you say he would be able to read with glasses? [45]

A. I would say he would not, no.

Q. Do you have your card with you?

A. Do I have my card?

Q. Yes, your record that you keep.

A. I don't have my exact card of Mr. Harley, no, because it was destroyed by my girls unknowingly.

I had the word "Deceased" on both his card, and Mrs. Harley's card, and I had it as Mr. Dan L. Harley and Mrs. Dan L. Harley. So what happened, I am sorry, I tried to find the card, and we had the two cards right side by side there, and the girl, without knowing, thought she had thrown out Mrs. Harley's card, and she had thrown out Mr. Harley's card, and all I have is just Mrs. Harley, Mrs. Dan L. Harley.

Q. Then you have been refreshing your memory from this card, have you not, Doctor?

A. I had in the past, because every time Mr. Harley would come in, I would always look to the card, because we talked about his eyes quite a bit. So for that reason I knew his eyes better than any other patient I ever had.

Q. I am talking about your testimony here in

(Testimony of Dr. Stuart P. Steelman.)

court. You have been refreshing your memory from your card; is that not correct?

A. That's right.

Q. When did you last see the card?

A. The last time I saw the card was when Mr. [46] Jim Harley came in to tell me about his uncle—is it his uncle?

Q. That is right.

A. He mentioned about his uncle had passed away, which I think was about—I don't remember, I think it was around seven or eight months—pardon me—seven or eight weeks after I saw Mr. Harley for the very last time.

Q. And did he tell you that there was going to be some litigation coming up regarding Mr. Harley's estate?

A. He didn't go into detail too much, but he said there was something, so I told him I will keep this card here for any future knowledge. So at that time I checked about the visual acuity, and I brought out the card, and I told him what it was, and I refreshed my memory from the card at that time. As I say, that was the last time that I saw the card, to my own cognizance, at the time that Mr. Harley told me about his uncle passing away.

Q. And you destroyed the card after that?

A. I didn't knowingly destroy the card. I had it in my card file. In fact, I had the big word "Deceased" on it, "Hold for reference." And on his wife's card I had "Deceased, hold for refer-

(Testimony of Dr. Stuart P. Steelman.)

ence," and I had the two of them together, so they would be right together.

Q. And you say the last time you saw the card was three or four weeks after Mr. Harley passed away; is that correct? [47]

A. That's right, yes, sir.

Q. And Mr. Harley passed away on or about the 30th of July, 1955, so you saw the card about the middle of August; is that correct?

A. I would say approximately so, yes, sir.

Q. And you refreshed your memory from information that you saw on that card in the middle of August, 1955; is that correct? A. That's right.

Mr. Boshae: I have no further questions.

The Court: Any redirect?

Mr. Young: None, your Honor.

The Court: You may step down.

(Witness excused.)

The Court: The next witness.

Mr. Young: Mr. Grenier I observe is here, your Honor.

May Dr. Steelman be excused, your Honor?

Mr. Boshae: So far as I am concerned, he may.

The Court: He is excused.

J. H. GRENIER

the defendant herein, called as a witness under the provisions of Rule 43(b) of the Federal Rules of Civil Procedure, having been first duly sworn, was examined and testified as follows: [48]

The Clerk: Will you state your name, please?

The Witness: J. H. Grenier.

The Clerk: Be seated, please.

Direct Examination

Q. (By Mr. Young): Mr. Grenier, what is your business or occupation?

A. Well, right now I am retired, and have been for about five years.

Q. What was your business when you were active?

A. Well, I was in the tavern business and the oil business.

Q. Where do you reside?

A. Deer Lodge, Montana.

Q. Are you a citizen of the State of Montana?

A. I am.

Q. Did you know Dan L. Harley during his lifetime? A. Yes, for about 50 years.

Q. Where did you meet Mr. Harley?

A. In Butte, Montana.

Q. Were you and he ever associated in business together? A. We were.

Mr. Boshae: If the court please, may I ask Mr. Young whether he is calling him——

Mr. Young: Pardon me, your Honor. I call [49] Mr. Grenier, the defendant in this action, under

(Testimony of J. H. Grenier.)

Rule 43(b) of the Federal Rules of Civil Procedure.

Mr. Boshae: Your Honor,—well, that is all right. We withdraw the objection at this time.

Q. (By Mr. Young): Did you have occasion to see Mr. Harley at his home in Glendale on or about March 20, 1955? A. On March 20th?

Q. On or around March 20th?

A. Yes, right after, the 21st.

Q. And what was the purpose of your seeing him on that occasion?

A. Mr. Harley called me up and told me that his wife died, and I flew down here.

Q. You flew down from your home in Montana?

A. Yes, sir.

Q. And did you go to Mr. Harley's home?

A. No, I went to the Biltmore Hotel that night, and went to Mr. Harley's home the next day. He asked me to come down.

Q. Then did you remain in his home for a while? A. No, I didn't.

Q. You went back to the Biltmore Hotel?

A. Yes, sir.

Q. On that occasion were you present at a conversation with Mr. Edgar, and Mr. Harley, Jim Harley, and yourself? [50]

A. You mean in that period?

Q. Yes. A. No.

Q. Were you ever present when a conversation took place, around March 20 or 22, 1955, between Mr. Dan L. Harley, Mr. Joseph H. Edgar, and

(Testimony of J. H. Grenier.)

Jim Harley, about drawing a will for Mr. Harley?

A. No, I was not.

Q. You were not there?

A. I was there, but I never heard any conversation, or see or heard of a will. I was—I knew there was a will in existence, but I didn't see it. I was in the other room when that said will that you are bringing up now was being signed. That's all I know about the will.

Q. Were you present at a conversation between Mr. Joseph H. Edgar, Mr. Dan L. Harley, and Mr. Jim Harley, when Mr. Dan L. Harley said to Mr. Edgar, "I want to leave my friend, Joe Grenier, some property in my will"?

A. Well, I can't say that I did. I wasn't there. No, I didn't hear that kind of a conversation. As I say, I know nothing about the will that you have reference to. I didn't see it signed. I was in another room. I didn't hear it read, nor didn't know anything about it.

Q. On the occasion that the conversation I referred to in the previous question took place, did [51] Mr. Dan L. Harley state, "I want to leave Joe Grenier a one-half interest in the Deer Lodge property"?

A. I never heard that statement made, no.

Q. On the occasion I have referred to, did you state, "Dan, I don't want you to leave me anything. I have all the money I need, and I don't want any of your property"?

A. No, I didn't make a statement like that. In

(Testimony of J. H. Grenier.)

fact, I would be foolish if I ever did make a statement of that kind.

Q. You did not make that statement?

A. No, I did not make that statement.

Q. Did you at any time know that a will had been signed by Mr. Harley, in which he left you a one-half interest in the Deer Lodge property?

A. I did after the will was signed, and I was told that I was left a one-half interest in the Deer Lodge property, yes.

Q. Who told you that?

A. Oh, I don't know. I don't recall.

Q. How long did you remain in Los Angeles when you came down on this occasion of Mrs. Harley's passing away?

A. Well, that I can't recall, the exact number of days. I would say, oh, at least five or six days, maybe a week.

Q. Did you stay out at Mr. Harley's house any part of the time? [52]

A. No, the place was being occupied by her sister-in-law, and Mrs. Harley's nieces.

Q. Were you here on April 7, 1955?

A. April 7th? I can't—I couldn't say anything about—I mean, I can't say anything authentic about dates. I was here from March 20th until the time Dan Harley died on July 30th at least seven or eight times. He would call me up, and call me back, and want me to do something for him, and I don't know, and I couldn't specify any specified dates, no.

(Testimony of J. H. Grenier.)

Q. Did you ever hear a conversation with Mr. Dan L. Harley on or around the 1st of April, 1955, with reference to a contest that had been filed by Mrs. Benifer and Mrs. Kelly on the will of Mrs. Harley, Mrs. Tessie Harley? A. Yes, I did.

Q. You knew such a contest had been filed?

A. I did.

Q. Is that right? A. I did.

Q. And did you discuss that contest with Mr. Harley?

A. Well, not necessarily, I didn't, no. I had no occasion to discuss it, outside of wondering why she did it.

Q. Did he ever make any remarks to you concerning his attitude with reference to that contest?

A. Of the will? Yes.

Q. What did he say?

A. Well, she was trying to have him declared incompetent, and made administratrix of his wife's estate.

Q. When did that conversation take place?

A. Well, during that period of time. I couldn't say any exact time.

Q. After you had this conversation, where he expressed himself as you have indicated, he told you he was going to make another will, didn't he?

A. No, he did no such a thing. I wasn't here when that will was made, and I wasn't here when it was signed, and I didn't know anything about another will being made, that is, prior to my com-

(Testimony of J. H. Grenier.)

ing back. When he called me back again, then I knew there was another will in existence.

Q. Were you here when the incompetency hearing took place? A. Yes, sir.

Q. Did you go to court at that time with Mr. Harley? A. Yes, sir, I did.

Q. Is that right? A. Yes, sir.

Mr. Young: Let me see that file, will you, please?

(The document referred to was handed to counsel.)

Mr. Young: Your Honor, may I ask for a [54] stipulation with counsel?

The Court: You may.

Mr. Young: Will counsel stipulate that the answer of Mr. Dan L. Harley, in Case No. 363573 in the Superior Court of the State of California in and for the County of Los Angeles, in the Matter of the Estate and Guardianship of Daniel L. Harley, Alleged Incompetent,—that the answer of Mr. Harley to that petition requests the court that if a guardian is to be appointed for him, that his nephew, James Harley, be appointed guardian?

Mr. Boshae: Well, counsel, if it so states, I will stipulate. I haven't read the Answer, your Honor.

Mr. Young: Well, I thought you brought the file over.

Mr. Boshae: I didn't.

Mr. Young: Here it is (indicating).

Mr. Boshae: We will stipulate that in Paragraph VII, or, that the objections and answer of Daniel L. Harley to the Petition for Appointment of

(Testimony of J. H. Grenier.)

Guardian of his Person and/or Estate may be introduced into evidence by reference.

Mr. Young: May I read it into the record, your Honor, because this is a file of the Superior Court?

The Court: If there is no objection.

Mr. Young: If there is no objection, may I read that paragraph?

Mr. Boshae: Yes, counsel. [55]

Mr. Young: Quoting paragraph VII, page 3, of the Objections and Answer of Dan L. Harley to the Petition.

The Court: Filed what date?

Mr. Young: The date, your Honor?

The Court: The date when filed in the Superior Court.

Mr. Young: The date it was filed is April 7, 1955.

The Court: That is in the Los Angeles County Superior Court?

Mr. Young: In the Los Angeles County Superior Court, your Honor.

The Court: In proceeding number?

Mr. Young: Proceeding No. 363573, in the Matter of the Estate and Guardianship of Daniel L. Harley, an Alleged Incompetent Person. This is paragraph VII:

“Answering the allegations of paragraph VII, he alleges that he is not in need of a guardian, either of his person or of his estate. He further states and alleges that if he were in need of a guardian, he would request the appointment of his nephew, James W. Harley, Jr., as guardian of his

(Testimony of J. H. Grenier.)

person and/or estate. That James W. Harley, Jr. is a competent businessman, of the age of about 42 years, and resides in the City of Long Beach, California. That said James W. Harley, Jr. is willing to give him such help as may be needed without [56] the appointment of himself as a guardian. However, he, Daniel L. Harley, has not suggested or requested said nephew or anyone else to take any action for the appointment of a guardian of his person or estate, and he feels entirely capable of handling his own personal and business affairs.”

Q. Mr. Grenier, did you and Mr. Harley have a joint bank account together? A. Yes, sir.

Q. In what bank? A. The Security——

Mr. Boshae: Your Honor, I am going to object to that as irrelevant, incompetent and immaterial, as to any bank accounts, and submit, your Honor, that it is not within the issues of this case.

The Court: Overruled.

Q. (By Mr. Young): In what banks were these accounts maintained?

A. The Security Bank of Glendale, and the Bank of America in Glendale.

Q. And any other bank?

A. The Deer Lodge Bank & Trust Company of Deer Lodge, Montana.

Q. Did you and Mr. Harley have a joint safety deposit box during his lifetime? [57]

A. Yes, sir.

Q. Where was that located?

A. At the Bank of America in Glendale.

(Testimony of J. H. Grenier.)

Q. In Glendale? A. In Glendale.

Mr. Young: We offer in evidence, if your Honor please, the signature cards and the contract between Mr. Harley and Mr. Grenier and the Bank of America as the Plaintiff's Exhibit next in order,—No. 4, I believe, your Honor.

The Court: You offer them as a single exhibit?

Mr. Young: Well, there are three cards. I will identify them. The bank account at the Bank of America; the bank account at the Security-First National Bank, the Glendale Branch,—

The Court: I would suggest that you take them one at a time. The first will be Plaintiff's Exhibit 4 in evidence, the next Plaintiff's Exhibit 5 in evidence, and the third Plaintiff's Exhibit 6 in evidence.

Mr. Young: Thank you, your Honor.

(The documents referred to were marked Plaintiff's Exhibits 4, 5 and 6, and were received in evidence.)

Q. (By Mr. Young): Did you have any discussion with Mr. Harley with reference to opening these accounts as a joint account in your name and his?

A. Did I have any discussion with him? [58]

Q. Yes.

A. Yes. At his suggestion, he said, "I am going to make a joint account with you and I, so that you can handle the business—transact my business, such as paying bills, and so forth."

Q. And after these accounts were opened at the

(Testimony of J. H. Grenier.)

Bank of America and the Security Bank, did you draw checks and sign your name? A. Yes, sir.

Q. And you paid bills only with them?

A. That's right.

Q. Is that right? A. Yes, sir.

Q. Did you deposit any of your own money in any of these accounts?

A. No, I did not.

Q. After Mr. Harley died, what happened to the accounts?

A. What happened to the accounts?

Q. Yes.

A. I had it transferred into my name, because it was a joint account.

Q. You transferred the balances to your own individual name?

A. Transferred to my individual name. [59]

Q. Is that right? A. Yes, sir.

Q. Do you know Mr. Joseph H. Edgar?

A. Yes, sir.

Q. When did you first meet Mr. Edgar?

A. Well, that's questionable, too. I think it was in 1954, when he come to—I happened to be down visiting the Harleys at the time, and he come on one Saturday afternoon, with a letter of introduction from a lawyer back in Youngstown, Ohio, introducing him to Mr. Harley, and asking him, that is, he wanted Mr. Joe Edgar to act as an attorney for Miss Fanny Harley's part of the estate in Los Angeles.

(Testimony of J. H. Grenier.)

Q. When was the last time you saw Mr. Harley alive?

A. Well, I think I left here, in fact, I am positive I left here on a Thursday morning, which would be the 27th, I think,—let's see. The 27th in Las Vegas, the 28th in Salt Lake—no, it was the 28th, because it took me three days to get home.

Q. During the period of time from your first acquaintance, the first time you became acquainted with Mr. Edgar, down to the time Mr. Harley died, did you ever see Mr. Edgar in Mr. Harley's home?

A. Yes, pretty near—yes, at least once or twice a week.

Q. That would be when you were here? [60]

A. That is when I was here, yes.

Q. Yes. Now, on May 17th did you go to a stationery store in Glendale and purchase a deed?

A. Purchase a what?

Q. A deed, a form deed, warranty deed?

The Court: Is the original of Plaintiff's Exhibit 1 placed before the witness? Mr. Clerk, will you place it before the witness?

(The document referred to was passed to the witness.)

The Witness: Yes, at Mr. Harley's suggestion, I did. The form,—I purchased the form, yes, sir.

Q. (By Mr. Young): What is the date of that deed? A. The 16th day of May.

Q. Is that the date that you purchased the deed at the stationery store?

A. No, sir, it was not. That was the date that

(Testimony of J. H. Grenier.)

this was signed by a notary public and Mr. Harley.

Q. When did you purchase the deed?

A. Oh, I would say about a week or ten days prior to that.

Q. And where did you purchase it?

A. Well, that's something I couldn't tell you, where I purchased it.

Q. What did you do with it after you purchased it?

A. Took it down and had it recorded, according [61] to Mr. Harley's orders, and left it there, and I went back to Montana.

Q. When you purchased the deed which you were holding, it was blank, there wasn't any printing on it, was there? I mean, typed printing?

A. No, certainly not.

Q. Didn't you take that deed, after you purchased it, over to a public stenographer in Glendale?

A. Yes, I had the deed recorded—I mean, the description typed on this deed, the description of the property.

Q. Was that all that was typed at that time?

A. That's all, yes, that I know of.

Q. Wasn't the date typed in it?

A. No, there was no date typed in there.

Q. Will you look at the deed and state whether or not the typewriting of the public stenographer with reference to the description of the property and the date on the deed——

A. I say there was no date. I don't know. I

(Testimony of J. H. Grenier.)

guess, I imagine that was, that the date was typed on it.

Q. The date was typed in there? A. Yes.

Q. What date is there? A. The 16th.

Q. The 16th of May? A. Yes. [62]

Q. But yet you had the deed written up a week or ten days prior to the 16th of May; is that right?

A. Well, I don't remember that either. I wouldn't want to——

Q. What did you do with the deed after it was written up——

A. Left it with Mr. Harley.

Q. ——by the public stenographer?

A. Took it back to Mr. Harley.

Q. Did he sign it?

A. Signed it in front of the notary public, yes.

Q. Did he sign it the day that you took it back to him?

A. I don't remember that. I don't think so.

Q. Isn't it a fact that you took the deed back to him the day that the public stenographer filled it out, which was at least a week or ten days prior to May 16, 1955, and left it with him in his house?

A. I took it back to him, yes.

Q. He didn't sign it on that day that you took it back? A. Not that I recollect, no.

Q. After you took it back to him on the day that the public stenographer typed it, you left shortly thereafter and went back to Montana, didn't you? A. Yes, sir. [63]

Q. Then you returned to Los Angeles or Glen-

(Testimony of J. H. Grenier.)

dale on or about the 16th of May; is that right?

A. Well, approximately, yes.

Q. And on your return to Glendale, you stayed with Mr. Harley in his home; is that right?

A. Yes, sir.

Q. On the 16th of May, you went to the Bank of America and asked a notary public to accompany you to Mr. Harley's home; is that right?

A. Per Mr. Harley's instructions, yes, sir.

Mr. Young: May I ask that that answer be stricken as not responsive, "per his instructions"?

Mr. Boshae: I think he has asked that.

The Court: That is explanatory. He says yes, as I understand the answer, pursuant to the instructions.

Q. (By Mr. Young): Do you recall the name of the notary public?

A. Yes, very well. Miss Bretschneider.

Q. And you took her in your car from the Bank of America to Mr. Harley's home,——

A. Right.

Q. ——is that right? A. Right.

Q. And on that occasion did Mr. Harley sign the deed?

A. Sign the deed? Yes, he did. [64]

Q. In the presence of the notary public?

A. Yes.

Q. And then you gave the notary public a \$5 bill; is that right? A. Yes, sir, I did.

Q. And then you took her back to the Bank of America? A. I did.

(Testimony of J. H. Grenier.)

Q. Now, subsequent to the signing of this deed, did you have occasion to see the notary public again? A. Yes.

Q. With Mr. Harley? A. Yes.

Q. It is a fact that on or about the 18th of July you took Mr. Harley over to the Bank of America, and requested the notary public to come out to the car and acknowledge his signature on a general power of attorney in your favor; is that right?

A. That's right.

Q. And she did so; is that right?

A. That's right.

Q. At that time Mr. Harley was too weak to walk, wasn't he? A. No, he wasn't.

Q. But he didn't walk into the bank?

A. No, he didn't. [65]

Q. Is that right?

A. He walked out to the car, but he didn't walk into the bank.

Q. Now, what consideration did you give Mr. Harley for the deed of May 16th?

A. I didn't give him any consideration for it.

Q. How is it that you put revenue stamps on the deed?

A. Because the Clerk and Recorder of Powell County in Deer Lodge, Montana, told me to put the stamps on.

Mr. Young: I move to strike that answer, your Honor, as hearsay.

Mr. Boshae: Just a moment. Your Honor, he asked the question as to why he put the stamps on.

(Testimony of J. H. Grenier.)

The Court: May I see the deed, please?

(The document was handed to the court.)

The Court: Motion denied.

I notice there are \$13.20 stamps on the deed. How is it that you happened to put that amount on it?

The Witness: The Clerk and Recorder estimated the amount.

The Court: How did he estimate it?

The Witness: Through the—for the taxation—assessor's valuation of that particular piece of property.

The Court: In putting \$13.20 in stamps on, were you attempting to put on stamps equivalent to representing the value? [66]

The Witness: The Assessor's value, yes, sir. That is what the Clerk and Recorder suggested I do.

Q. (By Mr. Young): Isn't it a fact that the stamps, as they appear on this warranty deed, were placed by you on the deed in Los Angeles?

A. No, they were not. They were purchased and placed on the deed in Deer Lodge, Montana.

Q. Weren't those stamps on the deed at the time the signature of Mr. Harley was applied?

A. They were not on the deed. They were placed on the deed and bought in the post office at Deer Lodge, Montana.

Q. Was this property deeded to you by Mr. Harley as a gift? A. Yes, sir, they were.

Q. What did he say to you about that?

(Testimony of J. H. Grenier.)

A. What did he say?

Q. Yes.

A. Well, he wanted to change his will, he wasn't satisfied with his will. He told Mr. Edgar that his will stank, that he wanted to change it, and Mr. Edgar suggested that he wait until this trial was over with that his sister-in-law had instituted against him, in order to stop a lot of litigation and a lot of confusion. And Mr. Edgar suggested to him to wait until this trial was over.

So Mr. Harley got disgusted with it, and he said, [67] "I am going to change—I am going to do this, to see that this part of the will will be changed. I am going to give you, deed you the property."

Now, that is the sum and substance of that performance.

Q. What will did he refer to that stank?

A. The last one he drew, the one that Mr. Thompson was supposed to have drawn up for him, and Mr. Thompson was there, and while the signatures was on.

Q. The will that he told you stank was the one that Mr. Edgar——

A. He told Mr. Edgar that. He didn't tell me. He told Mr. Edgar.

Q. But you were present?

A. I was present, yes.

Q. And that was with reference to the will of March 22nd, in which he left a part of his property to his wife's sister, is that right?

(Testimony of J. H. Grenier.)

A. No, that was with reference to the will that he made in April, I imagine. Yes, in April.

Q. April 7th? A. Yes.

Q. What part of it did he say stank?

A. He said the whole will stank.

Q. The part where he left you an undivided one-half interest? [68]

A. No, he said the whole will stank.

The Court: One at a time, gentlemen.

The Witness: The whole will.

Mr. Young: Pardon me, sir.

The Court: Just wait until the whole question is put before you start answering, and you wait until the answer is completed before you start another question.

Mr. Young: Sorry.

Q. Did he specify any provision of the April 7th will that stank?

A. I just got through saying he said the whole will stank, and he was very much dissatisfied with it.

Q. Did he state to you that he was quite worried and concerned over the contest that was filed on his wife's will?

A. Did he say he was worried about that?

Q. Yes. A. No, he never did.

Q. Didn't he talk to you about it constantly?

A. No, he didn't.

Q. Isn't it a fact that you told Mr. Edgar on July 18, 1955, in Mr. Harley's home, in the presence of Dan L. Harley, that Mr. Harley deeded that Deer Lodge property to you so that it would not

(Testimony of J. H. Grenier.)

be involved in the contest of Tessie Harley's estate?

A. No. Mr. Harley was the one that told Mr. Edgar that he [69] had deeded the property to me, and Mr. Edgar made the statement, "I wish you hadn't done it."

Q. Were you present then?

A. Yes, I was present.

Q. When did that conversation take place?

A. That conversation happened around that period that you just mentioned. I can't remember those exact dates.

Q. How did you happen to insert in the deed that the consideration was \$1?

A. I don't know. I guess that's the way it was made up. I mean, that's the way a deed is made up, a consideration of \$1, or \$10, or something of that sort. I have had several deeds made up in transactions that I have made in property, and that's the way they are made up.

Q. You had some experience with them?

A. Quite a bit of it, yes, sir.

Q. With reference to different forms of deeds; is that right?

A. Yes, sir, in Montana.

Q. And you knew that there was a deed which was known as a deed of gift, didn't you?

A. That I what?

Q. You knew there was a form of deed known as a deed of gift?

A. I didn't know such a thing, because I was never up [70] against that kind of a proposition before.

(Testimony of J. H. Grenier.)

Q. This was the first time any property had ever been given to you as a gift; is that right?

A. That's right, yes.

Q. Did you ever tell Mr. Edgar that Dan L. Harley had deeded the Montana property to you?

A. I never told him. Mr. Harley told him.

Q. Did you ever tell him? A. No.

Q. Did you ever tell Mr. Jim Harley, his nephew, that Dan L. Harley,—

A. No, not that I remember.

Q. — had deeded the Montana property to you?

A. No, it wouldn't have been necessary for me to tell him, because Mr. Harley had already told him.

Q. Did you ever tell him?

A. No, I did not.

Q. When was the first time that you disclosed to Mr. Edgar that a deed to the Montana property had been signed by Dan L. Harley?

A. I never disclosed to Mr. Edgar. Mr. Harley disclosed to Mr. Edgar.

Q. On July the 18th or 19th, did Mr. Edgar say to you, "I understand that Dan has deeded the Montana property to you"? [71]

A. I just got through telling you, Mr. Young, that Mr. Harley told Mr. Edgar in front of me that he had deeded the property to me, and Mr. Edgar said, "I wish you hadn't done it."

Q. When was that?

A. That was during that period.

(Testimony of J. H. Grenier.)

Q. What period?

A. That you just mentioned.

Q. What date?

A. I don't know. Around in April or May, or somewhere around in there, around that period. As for dates, I would not want to commit myself, because I wouldn't know the exact date.

Q. Did you tell Mr. Edgar, when this conversation you are referring to took place, that you had consulted a Mr. Sturzenacker with reference to drawing the deed?

A. That is another thing that come up. Mr. Harley, being dissatisfied, asked me to find out, or to find some lawyer in case he wanted to change his will, to make a new will. I said I would, and I did.

Q. Did you tell Mr. Edgar on the occasion I have referred to, that you had conferred with Mr. Sturzenacker about drawing the deed?

A. I said I was talking to Mr. Sturzenacker.

Q. What is that? [72]

A. I said I had talked to Mr. Sturzenacker.

Q. About this deed of May 16th?

A. Not the deed, no; about a will.

Q. You never talked to Mr. Sturzenacker at all about the deed? A. No.

Q. You never talked to anybody but the public stenographer in connection with drafting the deed?

A. That's right.

Q. Is that right? A. That's right.

Q. How do you explain the fact that this deed

(Testimony of J. H. Grenier.)

bears the date of May the 16th, when it was written up ten days before that date?

A. Well, I don't know. I couldn't explain that at all. I don't remember that, regarding the date.

Q. Did you tell Mr. Edgar that the bank accounts, which were opened in your name and Dan L. Harley's name, the balances would be turned over to the administrator of Mr. Harley's estate as soon as one was appointed? A. No.

Q. You didn't tell him that? A. No.

Q. Did you tell Jim Harley on the day of the funeral, August 1, 1955, Dan L. Harley's funeral, that you were tired [73] of the wisecracks that he was making about the bills you were paying out of those joint accounts, and that just as soon as the administrator of Dan L. Harley's estate was appointed, you would turn the balances over to the administrator?

A. I didn't tell him any such thing. I told him I was tired of the cracks he was making regarding my handling the bank account.

The Court: We will take the morning recess at this time for five minutes.

(A short recess.)

The Court: You may proceed.

Q. (By Mr. Young): Mr. Grenier, have you received the rents from the Deer Lodge property subsequent to May 16, 1955?

A. Did I receive the rents?

Q. Yes. A. Yes, I have been.

Q. You have collected the rents?

(Testimony of J. H. Grenier.)

A. I have been collecting the rents since 1954.

Q. Since when? A. '54.

Q. 1954. You collected the rents, then, before the property was deeded to you? A. Yes, sir.

Q. But you put those rents, prior to the date of the deed, into Mr. Harley's bank account, didn't you? [74]

A. Mr. Harley's, Mrs. Harley's and mine. There was three of us on that bank account in Deer Lodge.

Q. In Deer Lodge? A. Yes, sir.

Q. And you checked on that bank account for the payment of taxes on that Deer Lodge property?

A. I did.

Q. You didn't deposit any money in that bank account? A. How is that?

Q. You didn't deposit any of your own money in that account? A. No, I didn't.

Q. What did the rents amount to since the date you collected them?

A. Well, \$235 a month I think is what the total rents come to.

Q. Each month? A. Yes.

Q. Subsequent to May 16th; is that right?

A. That's right.

Mr. Young: Your Honor, we have another file of the Superior Court here, in the Matter of the Estate of Dan L. Harley, Deceased, No. 368110, which is here with a deputy from the County Clerk's Office, with reference to which I wish, with

(Testimony of J. H. Grenier.)

the court's permission, to ask the witness some [75] questions.

May I have the places that I have marked brought to the attention of the witness?

The Court: You may.

The Clerk: There are three places here where he put slips in.

The Witness: To read this?

The Clerk: Yes.

Q. (By Mr. Young): Mr. Grenier, I have indicated in the file before you a petition to probate the will of Dan L. Harley. Are you examining that petition?

The Court: Do you find the petition?

The Witness: Is this the one, that is real estate, annual rent, fifteen hundred; stocks and bonds, annual income, five hundred; personal property,—

Q. (By Mr. Young): Yes, the one you are looking at, the petition for the probate of the will of Mr. Harley. A. Yes, sir.

Q. And on the inside of that petition is what purports to be a copy of a will; is that right?

A. Yes, sir.

Q. What is the date of that will?

A. This is the 28th of July.

Q. The 28th of July, 1955?

A. Yes, sir. [76]

Q. When did Mr. Harley die?

A. The 30th of July.

Q. Do you know what he died of?

A. Do I know what he died of?

(Testimony of J. H. Grenier.)

Q. Yes.

A. Well, no, not exactly. I don't know any medical term that I could apply to his death, outside of him being asthmatic, and maybe a heart ailment, or something of that sort. I couldn't tell you what he died of, no.

Q. You saw him on July 28th?

A. I saw him, yes, quite often, yes.

Q. In his home? A. Yes.

Q. Then you went back to Montana on July 28th? A. I left for Montana——

Q. You left here on July 28th, didn't you?

A. Yes.

Q. And he died two days later?

A. He died on the morning of the 30th.

Q. You know he had a severe cerebral hemorrhage, don't you?

A. You mean the cause of his death, then?

Q. Yes.

A. No, I didn't know what caused his death.

Q. You didn't know it. Now, this document that [77] you have inspected, does it have your signature on it, on the inside page; not on the top page, on the bottom of the inside page?

A. That is not my signature.

Q. Is that your signature?

A. No, it is not.

Q. What signature is there?

A. "Joe Grenier."

Q. That is not yours? A. No, sir.

Mr. Young: May I see the file, Mr. Clerk?

(Testimony of J. H. Grenier.)

The Witness: I have never signed my name as "Joe Grenier." I have always signed my name as "J. H. Grenier."

Q. (By Mr. Young): Well, I call your attention to the back of the petition, and the signature "Joe Grenier" and the verification acknowledged by a notary public, and ask you if that is not your signature which appears on the back of the petition.

A. No, sir, that is not my signature.

Mr. Young: May I see the file?

The Witness: As I stated before, I have never signed my name as "Joe Grenier."

Q. (By Mr. Young): Is the name "Joe Grenier," which appears in the two places on the petition, in your handwriting? [78]

A. Those two names you just——

Q. Yes.

A. They are not in my handwriting, and are not my signature.

Q. Were you down in the office of Mr. W. I. Gilbert, Jr. on or about the 10th day of August, 1955?

A. I was.

Q. Did you see Mr. Gilbert?

A. I saw somebody. I don't know whether it was Mr. Gilbert or not.

Q. Did you see Mr. Wunderlich?

A. Mr. who?

Q. Mr. Wunderlich, an attorney in Mr. Gilbert's office.

A. Wunderlich? Is he the attorney—no, I saw

(Testimony of J. H. Grenier.)

Mr. Wunderlich, yes, or Mr. Gilbert. I have got the law offices mixed up.

Q. Was this petition, which you have inspected, for the probate of the will presented to you when you were in their office?

A. Yes, it was presented to me.

Q. Did you read it over?

A. I don't recollect whether I did or not.

You want me to read this will?

Q. No, did you read it at the time you were in Mr. Gilbert's office, the petition which is now before you? [79]

A. No, I didn't read it.

Q. You didn't read it. Did you read the will, which is a part of the petition?

A. No, I didn't. I only knew this was the will that Mr. Whitworth was supposed to be the executor of.

Q. You were named as executor in that will, weren't you?

A. I was named as co-executor, wasn't I?

Q. As co-executor? A. Yes.

Q. And you were in court, in the probate court, when that will was presented for probate; is that correct? A. Yes.

Q. You are also named as a beneficiary in that will; isn't that correct?

A. For a diamond ring, or something of that sort, yes.

Q. And the balance of the bank accounts in these joint accounts?

(Testimony of J. H. Grenier.)

A. Yes, sir. I imagine that's it. I don't know. I never saw that. I never paid any attention to that.

Q. How much was in those joint accounts, those two bank accounts, when you took the balances out and put them in your own account?

A. That I wouldn't want to say, because I don't know the exact amount. [80]

Q. It was approximately \$8,000, wasn't it?

A. No, it wasn't.

Q. \$6,000?

A. Between five and six thousand.

Q. Now, a contest was filed on that will, wasn't it, by Mr. Jim Harley? A. Yes.

Q. Is that right? A. Yes.

Q. Now, turn to the next page there, which shows your answer to that contest. That is marked with the yellow piece of paper. Do you see it?

A. Is that the first one? I am reading something here, "Comes now the respondents, Joe Grenier and Garnet Studebaker, in answer to the amended objections,"——

Q. Yes.

A. Now, what do you want me to say to this? What are you asking me about this?

Q. Was Mr. Boshae your attorney, who prepared that answer for you and filed it?

A. I guess he was, yes.

Q. Was that answer verified? Look on the inside of the blue cover. A. Was it verified?

(Testimony of J. H. Grenier.)

The Court: He means, did you sign on the inside of the [81] blue cover, that you swore to it?

The Witness: Well, I don't see my signature there.

Mr. Young: May I go to the witness, your Honor, and indicate to him?

The Court: You may.

Q. (By Mr. Young): Let me show you.

A. Yes.

Q. I direct your attention to a document which is indicated, "Answer," and ask you to look at the inside of the blue cover. A. Yes, sir.

Q. Do you see that signature, "Joe Grenier," there? A. Yes, I do.

Q. Is that your signature?

A. I never signed my name, as I remember, as "Joe Grenier"; always as "J. H. Grenier."

Q. Is that your signature?

A. Just a moment. I want to see what this is.

It must be, I guess, but I never signed my name as "Joe Grenier," that I know of.

Q. Who is the notary on that signature?

A. That must be my signature, yes.

Q. Isn't that the same signature which appears on the other document I called your attention to, the petition to probate the will? [82]

A. I don't know. I never signed my name knowingly as "Joe Grenier." It has been "J. H. Grenier." I can't understand that signature.

Well, I guess I will have to say that that's my

(Testimony of J. H. Grenier.)

signature, but knowingly I never signed my name as "Joe Grenier."

Q. Both of them are your signature?

A. It must be. It must be.

Q. Mr. Grenier, were you in Los Angeles on the 23rd day or the 24th day of this month, October?

A. The 24th day of this month?

Q. Yes. A. Yes.

Q. In Mr. Boshae's office? A. Yes.

Q. Is that right? A. Yes.

Q. The contest that was filed by Jim Harley to revoke this will that you are named as executor or co-executor in came up for hearing on that day; is that right?

A. I guess maybe it did. I don't know.

Q. You did not come to court, did you?

A. No, because I wasn't interested, and Mr. Boshae told me it wasn't necessary for me to appear in court.

Q. You were not interested under Mr. Harley's will that left you a legacy of approximately \$6,000?

A. Mr. Boshae was the one——

Q. Just answer my question.

A. No, because Mr. Boshae told me that I wasn't involved, or I shouldn't be interested in that particular will.

Q. Well, that will recites, as I have already called your attention to, that you are a beneficiary under that will to the extent of approximately \$6,000; is that right?

(Testimony of J. H. Grenier.)

Mr. Boshae: Your Honor, I am going to object as asked and answered.

The Court: Sustained.

Q. (By Mr. Young): Mr. Grenier, it is a fact that you didn't come to court at that hearing because you knew when this will was executed, on the 28th day of July, 1955, that Mr. Harley was of unsound mind?

A. No, Mr. Harley was never of an unsound mind up to the day I left him, on the 28th day of July. Mr. Harley was a very brilliant man, had a wonderful mind, and he never lost his mind, which they tried to claim, that he was incompetent.

Q. Then why didn't you come to court and say so?

A. Because my attorney said I didn't have any business in court on that 24th, or whatever day it was.

Q. Under that will you also got a diamond, didn't you?

A. I think so. I don't know.

Q. And your wife was left a diamond?

A. I imagine she was. I don't know. I never [84] paid any attention to the will.

Q. And you were named in the will as executor to administer the affairs of your good friend's estate?

A. As a co-executor.

Q. As a co-executor. And you knew, and that is the reason you didn't come to court, that that will was obtained by undue influence and fraud?

A. I didn't know any such thing. I didn't know

(Testimony of J. H. Grenier.)

about the will until I come back on the 30th day of March, or of July.

Q. You say in this petition to probate this will that Mr. Harley, on the 28th day of July, 1955, was of sound and disposing mind, and was not acting under undue influence or fraud,—isn't that in that petition?

A. I say, when I left here,—

Q. I am talking about the petition that is before you? A. I didn't quite grasp that.

Mr. Young: May I approach the witness stand and show him, your Honor?

The Court: You may.

Q. (By Mr. Young): Calling your attention to paragraph VIII over your signature, that you have now identified as your signature:

“That at the time said will was executed, to wit, on the 28th day of July, 1955, the testator was [85] over the age of 18 years, to wit, of the age of 77 or thereabouts, and was of sound and disposing mind, and not acting under duress, menace, fraud or undue influence, and was in every respect competent by last will to dispose of all of his estate”?

A. Well, that was up to the time I left on the 28th day of July, he was competent, but what happened after I left I don't know.

Q. You also knew that your friend, Mr. Harley, was of unsound mind when he executed that deed to you on May 16, 1955.

A. I don't know no such thing. Mr. Harley was just as sane as you and I are right now, and just

(Testimony of J. H. Grenier.)

as capable as you and I. As he told Mr. Edgar, "I am sick at body, but I am not sick at mind."

Q. You also took advantage of his weakened physical condition and unsound mental condition, and told Mr. Harley on or about the 16th day of May, 1955, that if he put the Montana property in your name, he would protect himself in the contest on his wife's will?

A. No, I didn't make any such statement. I didn't know—didn't make any such statement, and I didn't know the statement you are trying to impress me, that I knew that Mr. Harley was of unsound mind. Mr. Harley was just as sound of mind as you and I are right now up to the time I left [86] him on the 28th day of July.

Q. And you also told Mr. Harley, when you opened up the joint bank accounts, that in doing that with you he would protect himself and not have those bank accounts involved in the contest of his wife's will?

A. I did not. Mr. Harley made those accounts, and stated the money that was left, "I want you to have."

Q. That is what he said in the will?

A. That is what he said to me.

Q. At the time the accounts were opened?

A. At the time the accounts were opened, yes.

Q. Why was it necessary for you to sign checks on his bank account?

A. Well, Mr. Young, you would have to ask Mr. Harley that. Mr. Harley,—if he wanted any-

(Testimony of J. H. Grenier.)

body else, people that were here, such as Joe Edgar, as you call him, and his nephew Jimmy, if he wanted them to handle his bank accounts, he would have had them, instead of calling me back from Montana all during that period, and having me sign and be on his bank accounts. He would have had those two on his bank accounts, and handling his affairs, but instead of that he had me. Evidently he had some faith in my judgment in handling his accounts.

Q. Well, he signed checks on his own accounts—— A. Yes, sure, he did. [87]

Q. ——right up to the last time you saw him on July 28th.

A. Sure, he did. When I was gone, he signed them, and when I was here, I signed them.

Q. Why was it necessary for you to sign them at all, if he could sign his own checks?

A. You would have to find that out from Mr. Harley, so that's—you would have to find that out from him. If he wanted Mr. Jim Harley or Mr. Joe Edgar to carry on as I was carrying on, he would have had them, and I would not have had to be running to and fro from Montana.

Q. What was the occasion for having him sign the general power of attorney in your favor on the 18th of July?

A. Because I had a power of attorney in Montana, to handle his affairs there, and it began to look like—Dan thought, well, he might as well have one here, so he had me get the form, and

(Testimony of J. H. Grenier.)

he had the power of attorney drawn up, so that I could act for him in California.

Q. Act in what way? You were already acting—

A. Acting in the way of handling his business.

Q. What business did he have, other than these bank accounts?

A. His bank accounts, and paying his bills, and so forth.

Q. You were already signing checks on his bank accounts. [88]

A. Well, he just wanted me to have the power of attorney, and I got it.

Q. Now, you had a safety deposit box over at the Bank of America that you were on, too; is that right?

A. Yes, sir.

Q. And had you ever gone to that box?

A. Yes, sir.

Q. And you had put securities in it?

A. Put securities in, and took them out and sold them, as per his instructions.

Q. And the signature card, which has been introduced in evidence here of the Bank of America, that is your signature?

A. Yes, sir.

Q. And that box had approximately \$8,000 of bonds and securities in it; is that right?

A. Well, I wouldn't know the exact amount, no.

Q. And when Mr. Harley died, even though you were the surviving tenant, joint tenant, as you were in these bank accounts, you made no claim to any of the bonds or securities in that box, did you?

(Testimony of J. H. Grenier.)

A. No, I wasn't interested.

Q. You signed off on the box and the securities, and turned them over——

A. I turned them over to you, yes. [89]

Q. ——over to the administrator, didn't you?

A. I turned them over to you. I didn't turn them over to the administrator.

Q. Did Mr. Harley ever tell you when he died those securities were to belong to you?

A. He didn't tell me anything about that.

Q. He didn't tell you anything about that?

A. No.

Mr. Young: That is all.

Mr. Boshae: I have no further questions.

The Court: You may step down.

(Witness excused.)

The Court: Your next witness.

Mr. Young: Mr. Jim Harley.

JAMES W. HARLEY

called as a witness on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: Will you state your name, please?

The Witness: James W. Harley.

The Clerk: Be seated, please, Mr. Harley.

Direct Examination

Q. (By Mr. Young): Mr. Harley, you are the nephew of the decedent, Dan L. Harley? [90]

A. Yes, sir.

Q. And you are his only heir? A. Yes, sir.

(Testimony of James W. Harley.)

Q. And you are also the plaintiff in this action?

A. Yes, sir.

Q. And in your representative capacity as general administrator, with general powers, in the Estate of Dan L. Harley, deceased; is that right?

A. Yes, sir.

Q. With reference to the year 1955, do you recall the date your aunt passed away?

A. Aunt Tessie passed away on March 20th.

Q. 1955? A. 1955.

Q. At that time did you make any observation as to the condition of your uncle's health?

A. My uncle was in a general run-down condition at the time that Aunt Tessie died, because he had been naturally over-wrought, and over——

Mr. Boshae: Just a moment, your Honor.

Mr. Young: Just describe his condition.

Mr. Boshae: Will you stipulate that go out?

Mr. Young: Oh, yes.

The Court: What portion go out?

Mr. Boshae: All of it, your Honor. [91]

Mr. Young: No, not all of it.

Mr. Boshae: That portion relating to the run-down condition.

The Court: He says that is the way he appeared to him, the run-down condition. The portion about his being over-wrought may be stricken.

Mr. Young: That may go out.

Mr. Boshae: All right.

Q. (By Mr. Young): Go ahead and describe his condition, as you observed it at that time.

(Testimony of James W. Harley.)

A. Well, normally Uncle Dan's weight ran on the order of 135 to 150 pounds, and at the time that Aunt Tessie died, I recall him getting on the scale, and he was weighing just slightly over 100 pounds.

Q. That would be around March 20th?

A. March 20th.

Q. 1955. Had he suffered any serious illness that you knew about immediately prior to the time his wife passed away?

Mr. Boshae: To which I object as calling for a conclusion, and no proper foundation laid, your Honor.

The Court: Overruled. He may answer.

According to your understanding, had he suffered any?

The Witness: Dan had suffered an attack of pneumonia in February.

Q. (By Mr. Young): Of 1955? [92]

A. Of 1955.

Q. After your aunt passed away, to your knowledge, did he have any other illness, or any illness overcome him?

A. No specific illness, other than a continuous aggravation of the ones he already had, namely, the hernia, and difficulty with the respiration.

Q. What was that difficulty, as you observed it, with the respiration?

A. In general, it was a type of respiration trouble, apparently, where the lung would fill, and he

(Testimony of James W. Harley.)

would have difficulty in bringing up the mucus and matter of the lungs.

Q. Did he have a doctor? A. Yes.

Q. What was his doctor's name?

A. Dr. Ogden.

Q. Did he have more than one doctor?

A. At the very last there was another doctor.

Q. Did he have a nurse?

A. No. Oh, yes, at the last he had a nurse, Garnet Studebaker.

Q. When did she come on this case?

A. She came on the case, on Dan's case, you might say immediately on the demise of my aunt. However, she had been employed previously for my aunt.

Q. With reference to your uncle, did she stay [93] on his case after your aunt died?

A. Yes.

Q. For how long?

A. Up until the time of his death.

Q. And what was the nature of her attendance? How long was she there?

A. She was in continuous attendance.

Q. She stayed on the premises all the time?

A. Yes, to my knowledge.

Q. Did you ever observe your uncle taking any oxygen after your aunt died?

A. Oh, he took great amounts of oxygen.

Q. In your presence? A. Yes.

Q. All right. Now, on or around the 22nd day of March, 1955, after your aunt had passed away,

(Testimony of James W. Harley.)

were you present at a conversation between your uncle and Mr. Joseph Edgar, and Mr. Grenier?

A. Yes.

Q. And on that occasion state the conversation that you heard in the presence of the parties I have mentioned.

A. The conversation dealt specifically with the matter of Dan's will, in leaving—in how he was going to leave the property in Montana.

Mr. Boshae: To which I object, your Honor, as [94] not responsive to the question, and, certainly, a conclusion on the witness' part.

The Court: Overruled.

The Witness: In this conversation, the question came as to what Dan was going to do for Joe Grenier, which has been stated, and which was well known, that——

Q. (By Mr. Young): No, just state the conversation that you heard, who said this, and who said that.

A. Dan said, "What am I going to do with the property in Montana?" He said he wanted to leave a part of his property to Joe Grenier, that Joe had been his lifelong friend.

And I believe that it was Joe Edgar that asked Mr. Grenier if he wanted the property, or it may have been my uncle, I can't say specifically, but this was said, and Mr. Grenier replied that he didn't want any part of it, that he had everything that he needed.

(Testimony of James W. Harley.)

But my uncle said that in view of the fact that they had been friends, he wanted to leave him something.

And at this point the conversation went over to the idea that if Grenier did have half of the property, he would be on hand to take care of it, and collect the rents, and so forth, since he was a resident in the town in which the property was located.

Q. What was said, if anything, about the other half? Who was to get that? [95]

A. The other half was to be left to me.

Q. Now, subsequent to this conversation, did you have occasion to see Mr. Grenier again?

A. Yes.

Q. On how many occasions, or how many times?

A. Well, up to the time that—up to the time of the funeral, I would say on an average of once every ten days.

Q. And where would you see him?

A. At the 1330 Blossom Street home.

Q. That is your uncle's home? A. Yes.

Q. Did he on any occasion during that period ever tell you that your uncle had deeded the Montana property to him? A. No.

Q. Did your uncle ever at any time, after this conversation on or about March 20th, tell you that he had deeded the Montana property to Mr. Grenier? A. Yes.

Q. When?

A. Well, this was on or about June the 18th.

(Testimony of James W. Harley.)

Q. And where did that—where was he when he told you that? A. At home in Glendale.

Q. And who else was present at the conversation? A. Mr. Edgar. [96]

Q. And was that the first time that you knew that the Montana property had been deeded——

A. Yes.

Q. ——to Mr. Grenier? A. Yes.

Q. Now, after your aunt passed away in March, how frequently would you see your uncle up until the time he died?

A. Oh, for several—for several weeks I was going out and seeing him twice a week, usually on Wednesday and Saturday or Sunday.

Q. When is the last time you saw your uncle?

A. I saw him on the Wednesday preceding his death.

Q. Do you recall what date that was?

A. That would be on the 27th.

Q. He died on the 30th. The 27th?

A. On the 27th, yes.

The Court: We will take the noon recess at this time, gentlemen, until 2:00 o'clock.

Mr. Young: Very well. Until 2:00 o'clock, your Honor?

The Court: Yes.

Mr. Young: Thank you.

(Whereupon, at 11:52 o'clock a.m., a recess was taken until 2:00 o'clock p.m. of the same date.)

Wednesday, October 31, 1956. 2:00 p.m.

The Court: The case on trial. 18715, Harley v. Grenier.

You may proceed, gentlemen.

JAMES W. HARLEY

called as a witness on behalf of the plaintiff, having been previously duly sworn, resumed the stand and testified further as follows:

Direct Examination—(Continued)

Q. (By Mr. Young): Mr. Harley, did you go to court on the 7th of April, 1955, with your uncle in the incompetency proceeding? A. Yes.

Q. Did Mr. Grenier come to court?

A. Yes.

Q. Now, after that hearing did you return to your uncle's home in Glendale?

A. Yes, we returned there directly.

Q. Did you have a conversation with your uncle, in the presence of Mr. Grenier, after you returned home from court? A. Yes.

Q. Will you state that conversation, please?

A. Well, after we got home, we wheeled Dan out into the patio in a wheelchair, so that he could get a little bit [98] of sunshine and relax for a while, and discussed the various merits of the hearing in regard to his competency, and in this conversation, why, Dan stated himself that regardless of what the court found, he felt that he was incompetent.

Q. Now, with reference to that statement and

(Testimony of James W. Harley.)

the conversation you have referred to, were there any other occasions where you had a conversation with your uncle, in which he referred to himself or his mind?

A. Yes. It was some time later, and I feel that this must have been in the first part of July, as I recall it; maybe in the first week or two weeks of July. This followed the discussion which we had had with him about transferring that Montana property, and at that—after that discussion——

Mr. Boshae: Excuse my interruption: Was anyone else present?

Q. (By Mr. Young): I understand it was just with your uncle. No one was present except your uncle and you?

A. No one was present, with the possible exception of the nurse, Studebaker. I believe she was in the vicinity.

Q. Proceed.

A. Mr. Edgar suggested that I consult with you in regard to the transfer of this Montana property.

Mr. Boshae: Just a moment. Your Honor, I am going to object. This calls for hearsay testimony. I don't think that was the question, and I am going to object as incompetent, [99] irrelevant and immaterial, and hearsay.

The Court: Please guide the witness. Is he on the same conversation he started out on?

Mr. Young: Yes, your Honor.

Mr. Boshae: I understand, your Honor, he said that Mr. Edgar told him to see Mr. Young, and I

(Testimony of James W. Harley.)

didn't gather whether that was the same conversation.

The Court: We will have the reporter read it. I think you misunderstood it.

(The record was read.)

Mr. Young: I think probably that need not go in. I think I can connect it up.

The Court: You were asked for a conversation that you had with your uncle, as I understand it.

Mr. Young: That is right.

The Court: Weren't you?

The Witness: Yes, sir.

The Court: You weren't asked about Mr. Edgar saying something. You were asked what your uncle said and what you said at this time.

The Witness: Wasn't the question in regards to whether or not I had any other conversation with my uncle in regard to his competency?

The Court: Yes, but you were not asked what Mr. Edgar told you, unless it was a part of the conversation you had with your uncle. [100]

The Witness: I see, your Honor.

The Court: The question is: What did you say and what did your uncle say? That is what you are called upon to give us.

The Witness: To answer this question directly, I asked my uncle if he would concur to my being his guardian, since he felt that he was incompetent, and in this particular conversation he said that he would like to have me become his guardian.

Mr. Boshae: Said he would or would not?

(Testimony of James W. Harley.)

The Witness: He would.

Q. (By Mr. Young): Now, Mr. Harley, you have referred to your uncle as being in a wheelchair and being pushed around different places.

When, according to your own knowledge, did he commence to use a wheelchair?

A. This was right shortly after the incompetency suit.

Q. That was April 7th, to fix the date?

A. Yes.

Q. Is that right? A. Yes.

Q. To what extent did he use a wheelchair after you first saw him use it?

A. All the time, if he had any particular great distance to go. [101]

Q. Well, around the house, when he was in the house? A. Yes, in the house.

Q. How was your uncle attired after April 7th, when you would see him in the house?

A. I didn't get the question.

Q. How was he attired when you would see him in the house?

A. Oh, nearly always in his pajamas and robe.

Q. And after April 7th, up to the time he died, how much of his time did he spend in bed?

A. Well, of course, all of his nights in bed, and the rest of the time he was usually lying on the lounge, or in bed.

Q. Now, with reference to April 7th, as I understood your testimony this morning, you saw him approximately two times a week? A. Yes.

(Testimony of James W. Harley.)

Q. Following April 7th, up until the time he passed away? A. Yes.

Q. Is that right? A. Yes.

Q. On those occasions that you saw him, and after April 7th up until the time he passed away, did you ever talk to him about his health, or did he ever tell you anything about it? [102]

A. Oh, yes, on every visit.

Q. What did he say to you?

A. He said that he was getting progressively worse all the time, he couldn't breathe.

Whenever you would try to engage him in any conversation at all, he tended to drift off, sometimes go to sleep. He was not alert mentally as a result of this.

Q. With reference to his weight, did you have occasion to observe what happened, if anything, in that connection?

A. The last time I weighed my uncle was shortly after that incompetency suit, and at that time he weighed 85 pounds.

Q. How old was your uncle when he died?

A. 77.

Q. During the times you visited with him, as you have testified, did you have any occasion to engage in conversation with him, where he said anything about his eyesight?

A. Oh, yes, he said his sight had failed to the point where he didn't read anything any more.

Q. That was after April 7th? A. Yes.

Q. And up until the time he passed away?

(Testimony of James W. Harley.)

A. Yes.

Q. Now, with reference to his eating, what was his situation there, as you observed it? [103]

A. Well, he was an extremely light eater, and any food that was brought into him, he didn't want to eat it at all.

Q. Did you see Mr. Grenier on August 1, 1955?

A. Yes.

Q. Was that the date of the funeral?

A. Yes.

Q. Where did you see Mr. Grenier?

A. Pardon, the funeral wasn't on August 1st.

Q. Well, did you see Mr. Grenier, then, on or about August 1st? A. Yes.

Q. Where?

A. At the Blossom Street house.

Q. Did you have a conversation with him on that occasion? A. Yes.

Q. State the conversation.

A. Well, at this time Mr. Grenier approached me, and said that he was tired of listening or hearing about any cracks being made in regards to the way he was handling Dan's business and using the money in those joint bank accounts.

He stated at this time that he felt that he was a businessman and competent to handle them properly. He further stated that at such a time as the court appointed an executor that he would turn over all of the accounts and the business of the estate to the executor. [104]

Mr. Young: Cross examine.

(Testimony of James W. Harley.)

Cross Examination

Q. (By Mr. Boshae): Mr. Harley, is it not true that you didn't see your uncle very often prior to the death of your Aunt Tessie?

A. Very often?

Q. In fact, you never did visit there more than once or twice a year; isn't that correct?

A. That is not correct.

Q. How often did you visit there?

A. Oh, I would say that we would take a run over there probably once every month, six weeks, and they would come over to our house on three or four different occasions.

Q. Did you ever handle any business for your uncle, Mr. Dan Harley? A. No.

Q. As a matter of fact, he never asked you to handle any of his bank accounts, did he?

A. No.

Q. And you did not handle any of his financial business, did you? A. No.

Q. And you did not assist him, nor did you prepare any checks for him, did you, for his signature? [105] A. Oh, no.

Q. And yet you were visiting him quite frequently after your Aunt Tess died; is that correct?

A. Yes.

Q. Now, I believe you said, Mr. Harley, that you were present in court at the time of the guardianship proceeding? A. Yes.

Q. And you were in court when the court declared that your uncle was competent?

(Testimony of James W. Harley.)

A. Yes.

Mr. Boshae: Mr. Young, do you have any objection to my introducing an order in that proceeding?

Mr. Young: Your Honor, may I invite a similar stipulation from counsel in connection with his suggestion?

The Court: You may.

Mr. Young: Have you any objection to the copy of the order of Judge Schweitzer, dated October 30, 1956, in the proceedings with reference to the probate of the will, in which he found that the testator, Mr. Daniel Harley, was incompetent?

Mr. Boshae: With the further stipulation, counsel, that it was taken by default, no contest.

Mr. Young: Well, the order recites all of the appearances, and it was not a default. It was a hearing, on notice, and you were attorney of record, and you did not come.

Mr. Boshae: That is correct. [106]

Mr. Young: It wasn't a default. We proceeded and tried the case, and you were not there to put in a defense.

Mr. Boshae: In other words, there was no contest in the proceedings actually in court, no opposition.

Mr. Young: Nobody was there to oppose it, that is correct.

Mr. Boshae: With that stipulation, I have no objection.

(Testimony of James W. Harley.)

The Court: Very well. Do you offer it in evidence?

Mr. Young: I offer the order, then, of October 30th of Judge Schweitzer in evidence.

Mr. Boshae: I would like also to offer——

The Court: Just a moment. One at a time. The offer by plaintiff is received in evidence, pursuant to stipulation, as Plaintiff's Exhibit 7, Mr. Clerk?

The Clerk: Yes, your Honor, Plaintiff's Exhibit 7.

(The document referred to was marked Plaintiff's Exhibit 7 and was received in evidence.)

The Court: Now, what is your offer?

Mr. Boshae: My offer is to offer the order denying petition for appointment of guardian of the person and/or estate of an alleged incompetent person, Daniel L. Harley, in proceedings in the Superior Court of the County of Los Angeles, State of California, in the Matter of the Estate and Guardianship of Daniel L. Harley, an alleged incompetent person, No. 363573, dated April 13, 1955.

The Court: Pursuant to stipulation, the petition will be received as Defendant's Exhibit A.

The Clerk: Defendant's Exhibit A.

(The document referred to was marked Defendant's Exhibit A and was received in evidence.)

Q. (By Mr. Boshae): Now, Mr. Harley, I think you stated on direct examination that Mr. Edgar, or your uncle told you that he had given a deed

(Testimony of James W. Harley.)

to the Montana property to Mr. Grenier; is that correct? A. Yes.

Q. That was on or about June 18, 1955; is that correct? A. Yes.

Q. Now, when did you have this conversation with your uncle, in which you stated that he told you that he felt that he was not competent?

A. This was stated on at least two occasions that I know of. Which occasion do you have reference to?

Q. The first one first, please.

A. The first time that Dan made such a statement was on the day that we got back from court, from the incompetency hearing.

Q. All right. At that time, and when was the next statement?

A. The next statement was on or about July the 9th or 10th.

Q. That was after you knew that Mr. Grenier [108] had gotten title to the property in Montana; isn't that right? A. Right.

Q. Now, referring to the first statement, where Mr. Dan Harley told you that he felt that he was not competent, did you take any proceedings or initiate any proceedings to have yourself appointed as guardian? A. No, I did not.

Q. Also, with reference to the second conversation, which took place on or about July the 7th, 8th or 9th, is that correct,— A. Yes.

Q. —did you take any proceedings, or initiate any proceedings for or on behalf of Dan L. Harley,

(Testimony of James W. Harley.)

to have someone or yourself appointed as a guardian of his estate or person?

A. No, because——

Q. Now, Mr. Harley, did you do anything, or initiate any proceedings of any kind after June the 18th, take any action to set aside the deed from Dan Harley to Joe Grenier prior to his death?

A. On advice from my counsel,——

Mr. Boshae: I am not asking you that.

Mr. Young: Just a moment. Your Honor please, I think he is entitled to answer. Proceedings are not confined to legal proceedings. [109]

The Court: He may answer first, and then explain it, if he wants to.

Answer the question first. Then if you want to explain why you did what you did, you may do so.

The Witness: No.

The Court: And the reason is, if you want to say?

The Witness: And the reason for it was that on the advice of my counsel, Mr. Young, I couldn't, as an individual, take any legal action to have this set aside, unless I had been appointed guardian, and I didn't want to upset my uncle to the point of forcing such an issue unless he would concur.

Mr. Boshae: I am going to move to have the last portion, of what he wanted to do, stricken as not responsive.

The Court: That is explanatory. Motion denied.

Mr. Boshae: Thank you.

Q. (By Mr. Boshae): Did Mr. Young also tell

(Testimony of James W. Harley.)

you it would be necessary for Mr. Dan Harley to authorize such a proceeding before you could initiate any? A. No.

Q. Did you ever take Mr. Dan Harley to the bank at any time? A. No.

Q. As a matter of fact, Mr. Harley, you knew that your uncle was writing checks and transacting his business in the absence of Mr. Grenier, didn't you? [110] A. Yes.

Q. And was writing these checks as late as July of 1955; isn't that correct? A. Yes.

Q. During Mr. Grenier's absence. Did you ever ask your uncle to transact any of his business for him?

A. The only business that I took care of for him was to take care of details relative to my aunt's burial out in—that is, getting her headstone and the details relative to the cemetery proceedings.

Q. Do you know your uncle's signature when you see it? A. Yes.

Q. Just excuse me a second, your Honor please.

Mr. Harley, you also knew that your uncle was signing his checks without the assistance of anybody showing him how to put his signature on those check lines; isn't that correct?

A. I can't answer that in the affirmative and directly, as being all-inclusive, because sometimes he needed assistance, and sometimes he didn't. Sometimes his hand had to be put on the line. Otherwise he was lucid enough where he could write by himself, without assistance.

(Testimony of James W. Harley.)

Q. Did you ever put his hand on the line when he was signing a check?

A. Not a check. I did have to help put his hand on the line one time on some other business, having to do with [111] the transfer of the 38th Street house.

Q. That was conveyed to you, was it not?

A. That was conveyed to me.

Q. And that was by reason of the fact that you had inherited some property from your aunt; isn't that correct?

A. No, I had received no property from my aunt. Dan gave that to me as a gift.

Q. The service station property, is that what you are referring to?

A. No, I am referring to the old home on 38th Street.

Q. Mr. Harley, will you please look at these checks and tell us whether or not you recognize your uncle's signature on these.

(Witness examines checks referred to.)

The Witness: There are only two signatures here which I would question. Of course, one of them was signed by Mr. Grenier, and the rest of them, I am reasonably sure that they are all Dan Harley's signature, with the exception of this one. This one, I am not sure of this.

Q. (By Mr. Boshae): Would you say that it was not his signature?

The Court: That one being what? The record will not show.

(Testimony of James W. Harley.)

Mr. Boshae: A check. The witness is showing me a check No. 117, dated July, 1955, made payable to Garnet Studebaker, [112] in the amount of \$100.

The Court: Is that correct?

The Witness: That is correct, your Honor.

Q. (By Mr. Boshae): Now, would you say that that was not his signature?

A. No, I wouldn't say that.

Q. In other words, it doesn't appear as clear to you as the others? A. No.

Q. Is that correct? A. The rest are.

Q. Are his signatures. Now, can you tell me whether or not the entire check is in his handwriting, the checks I have shown you?

A. No, they are not.

Q. Is it your testimony that none of them are in his writing, except his signature?

A. That one is all in his writing.

Mr. Young: Refer to it as to date.

Mr. Boshae: Let him pick them out, Mr. Young.

Mr. Young: All right.

Mr. Boshae: And then I will put them in the record.

Q. Now, have you segregated them, Mr. Harley?

A. I would say that Dan wrote all of these checks (indicating). [113]

Q. Would you look at these checks over here?

A. And he did not write these (indicating).

Q. Would you check and look at this?

(Testimony of James W. Harley.)

A. That is Dan's. The nurse wrote these two (indicating).

Mr. Boshae: Now, your Honor, for the purpose of identifying these groups of checks, I would like to have this group here, which has at the top a check dated June 20, 1955, made out to Alert Ambulance, in the amount of \$14.76, signed by Dan L. Harley, which is the group of checks which this witness has testified was in the entire handwriting of Dan L. Harley,—

The Court: Is that correct?

The Witness: That is correct, your Honor.

The Court: Do you wish to offer them in evidence?

Mr. Boshae: Yes, I do, your Honor.

Mr. Young: No objection.

The Court: Received in evidence. As Defendant's Exhibit B, Mr. Clerk?

The Clerk: Yes, B, your Honor.

(The checks referred to were marked Defendant's Exhibit B and were received in evidence.)

Mr. Boshae: You can probably staple them together, Mr. Clerk.

Q. Now, Mr. Harley, would you kindly look over this group of checks, and see if you can identify Mr. Harley's [114] signature on them, please?

(Witness examines checks referred to.)

Mr. Boshae: Now, if the court please, while the witness is examining those checks, may I offer this group of checks into evidence, which has at the top

(Testimony of James W. Harley.)
a check dated—it is check No. 116, dated June 30, 1955, made out to Walter R. Ogden, M.D., in the amount of \$40, and signed by Dan L. Harley, which is the group of checks not made out entirely in his handwriting, but only signed by him.

Q. Is that correct, Mr. Harley?

A. That is correct.

Mr. Young: No objection.

The Court: Received in evidence.

The Clerk: Defendant's Exhibit C.

(The checks referred to were marked Defendant's Exhibit C and were received in evidence.)

Q. (By Mr. Boshae): Mr. Harley, in looking over those checks, would you kindly segregate the checks which are entirely in Mr. Dan Harley's own handwriting, and those which bear only his signature, please, including this group?

A. These, Dan wrote all of these (indicating), and somebody else wrote these (indicating).

Mr. Boshae: Let's dispose of this group of checks first.

Again, your Honor, I would like to introduce this group of checks, which has at the top a check dated May 24, 1955, [115] made out to the Reader's Digest Association, in the amount of \$3, check No. 72, which are the checks which the witness testified were made out entirely in Dan L. Harley's handwriting.

Q. Is that correct, Mr. Harley?

A. That is correct.

(Testimony of James W. Harley.)

Mr. Boshae: As defendant's next in order.

Mr. Young: No objection.

The Court: Received in evidence. As Defendant's Exhibit——

The Clerk: D in evidence.

(The checks referred to were marked Defendant's Exhibit D and were received in evidence.)

Mr. Boshae: May I make the observation, your Honor, that these checks are not necessarily in chronological order?

The Court: Very well.

Mr. Boshae: The top check is merely to identify the exhibit.

The Court: Very well.

The Witness: These Dan made out (indicating), and these, it looks like the nurse.

Q. (By Mr. Boshae): So that I can get your testimony correctly, Mr. Harley, the group of checks which I hold in my hand are also another group which Mr. Dan Harley made out entirely in his own handwriting?

A. As near as I can determine. [116]

Mr. Boshae: Let's offer this next in order, this group of checks, which has on top check No. 726, dated February 19, 1955, made out to Savemart Market, in the amount of \$100, which is a group of checks which the witness testifies were made out entirely in the handwriting of Daniel L. Harley.

The Court: Is that correct?

The Witness: That is correct, your Honor.

(Testimony of James W. Harley.)

The Court: Received in evidence. As Defendant's Exhibit——

The Clerk: Defendant's Exhibit E in evidence.

(The checks referred to were marked Defendant's Exhibit E and were received in evidence.)

Mr. Boshae: The next group of checks that the witness has handed me are a group of checks which has on top check dated July 7, 1955, No. 129, made out to Harry T. Innocent, in the amount of \$50, which the witness testifies has on them only the signature of Dan L. Harley, and the other portions were made out by someone else. I would like to offer them as next in order for the defendant.

The Court: Received in evidence as Defendant's Exhibit F.

The Clerk: Defendant's Exhibit F in evidence.

(The checks referred to were marked Defendant's Exhibit F and were received in evidence.)

Mr. Boshae: I have no further questions, your Honor. [117]

The Court: Any redirect?

Mr. Young: Yes, your Honor, one or two questions, if I may, please, sir.

The Court: You may.

Redirect Examination

Q. (By Mr. Young): Mr. Harley, a number of these checks which you have identified, and which counsel has introduced in evidence, are payable to the Alert Ambulance Service. Do you know what the purpose of those checks was?

(Testimony of James W. Harley.)

A. The main purpose of those checks to the Alert Ambulance was to pay for oxygen.

Mr. Young: For oxygen. May I approach the witness box, your Honor?

The Court: You may.

Q. (By Mr. Young): I show you a check dated May 16, 1955, on the Security-First National Bank, payable to the Alert Ambulance Service, and signed, "J. H. Grenier." Do you recognize that signature as being Mr. Grenier's signature? A. Yes.

Mr. Boshae: We will stipulate that both of those checks were signed by Mr. Grenier.

Mr. Young: The one on May 16th, as well as the check [118] on May 17th?

Mr. Boshae: Whatever the date is on them.

Mr. Young: Very well. Then, your Honor, we offer the check that is dated May the 16th as Plaintiff's Exhibit 8, I believe.

The Court: Received in evidence.

The Clerk: Plaintiff's Exhibit 8 in evidence.

(The check referred to was marked Plaintiff's Exhibit 8 and was received in evidence.)

Mr. Young: And the check dated May 17th as Plaintiff's Exhibit 9 in evidence.

The Court: Received in evidence.

The Clerk: Plaintiff's Exhibit 9 in evidence.

(The check referred to was marked Plaintiff's Exhibit 9 and was received in evidence.)

The Court: Anything further?

Mr. Young: That is all, your Honor.

Mr. Boshae: I have just one more question.

(Testimony of James W. Harley.)

Recross Examination

Q. (By Mr. Boshae): Mr. Harley, is it not true that Mr. Dan Harley did not necessarily use oxygen continuously, that he had tanks there in reserve whenever he needed them; isn't that correct?

A. That is correct. [119]

Mr. Boshae: I have no further questions.

Mr. Young: That is all.

The Court: You may step down, Mr. Harley.

(Witness excused.)

The Court: Plaintiff's next witness.

Mr. Young: Yes, your Honor. I wish to offer in evidence the statement of the Bank of America, which I show counsel, showing the balance that was in that joint account after Mr. Harley died, which was transferred to Mr. Grenier.

Any objection?

Mr. Boshae: I have an objection, your Honor, on the ground it is irrelevant, incompetent and immaterial, and does not tend to prove or disprove any of the issues in this case.

The Court: Is it stipulated the document itself is genuine in all respects in which it purports to be?

Mr. Boshae: Yes, your Honor.

The Court: The objection is overruled.

Mr. Boshae: Thank you.

The Court: And the document is received as Plaintiff's Exhibit——

The Clerk: 10. Plaintiff's Exhibit 10 in evidence.

(The document referred to was marked

Plaintiff's Exhibit 10 and was received in evidence.)

Mr. Young: Plaintiff offers in evidence, your Honor, a photostatic copy of the signature card of the joint account [120] of Dan L. Harley or J. H. Grenier at the Security-First National Bank, Glendale Branch.

Mr. Boshae: We will make the same objection, your Honor, and we will not question the fact that they are a copy of the records of the bank.

The Court: Will you stipulate that they are genuine in what they purport to be?

Mr. Boshae: Yes. They are photostats, however, your Honor.

The Court: There is no objection on that account, either, as I understand it?

Mr. Boshae: That is correct, excepting that we do not think they are relevant, competent or material, or go to prove or disprove any of the issues.

The Court: That objection is overruled, and it is received in evidence.

The Clerk: Plaintiff's Exhibit 11.

(The document referred to was marked Plaintiff's Exhibit 11 and was received in evidence.)

Mr. Young: Plaintiff offers in evidence, your Honor, a photostatic copy of the bank account of J. H. Grenier of the Security-First National Bank, showing the balance that was due in the joint account on September 1st.

I withdraw that offer. I have no correct records at this time. I thought I had them. [121]

Is Dr. Ogden in the courtroom?

Mr. Boshae: No, counsel. I contacted him, and I expect him here tomorrow morning.

Mr. Young: That is all right, your Honor. I am ready to close plaintiff's case, but counsel and I stipulated that we would not duplicate subpoenas or serve subpoenas on the same witness. So he advised me that Dr. Ogden would be here, and for that reason I did not subpoena him.

Mr. Boshae: I could have got him here this afternoon, your Honor, except that I did not know that Mr. Young was going to use him in his case in chief. He asked me about the subpoenas, but I didn't know.

Mr. Young: Well, I would have used him, yes. I thought he would probably be here.

The Court: You may reopen your case for that.

Mr. Young: Yes, your Honor.

Your Honor, the plaintiff respectfully moves the court to file an amendment to the amended complaint, which sets up the legal description of the real property which is involved in this action.

In the amended complaint we referred to it as certain business buildings in Deer Lodge, Montana, and state we will supply—or it may have been in our pretrial statement of facts—that we would supply the legal description when it was ascertained, and this is the legal description which is [122] contained in the deed, which is in evidence. And the amendment also sets forth the question of the rentals that have been received, as the defendant testified on the witness stand this morning. That

allegation was not set forth in the amended complaint, and I believe that is in issue in this action, which is properly before the court on the testimony of the defendant.

Mr. Boshae: If the court please, I have no objection to the amendment with relation to the description of the property.

However, in connection with the further claim of rents, in reliance upon the fact that it wasn't originally alleged, I have not all my records in connection with the expenses disbursed by my client in connection with that property.

Now, if counsel will stipulate that what Mr. Grenier will testify to insofar as expenditures are concerned to offset the rentals, I have no objection, but if we don't get that stipulation, your Honor, I am not prepared to stipulate to the filing of the other portion.

Mr. Young: Your Honor please, I always like to stipulate, but it seems to me that that situation about the expenditures on the buildings,—the property did not belong to Mr. Grenier, and if your Honor should so find, that he would not be entitled to any reimbursement for expenditures.

The Court: Do you offer a stipulation as to what [123] the expenditures have been since the death of the decedent?

Mr. Boshae: We will offer testimony on that, your Honor.

The Court: Can't you offer the stipulation right now?

Mr. Boshae: As to what the expenses are?

The Court: Yes.

Mr. Boshae: Can I have a few minutes, and I probably can.

The Court: Yes. We will take the afternoon recess at this time for five minutes.

(A short recess.)

The Court: You may proceed.

Mr. Young: We had made a motion, your Honor, to file an amendment to the amended complaint, and you had asked for a statement from counsel as to the expenditures.

Mr. Boshae: The amount I have, your Honor, is \$1,498.93.

The Court: How do you itemize it?

Mr. Boshae: There are taxes, \$385.39 for 1955; and installation of a roof, \$514.50; repair of floor as the result of dry rot, \$174.55; repair in the cement of \$12.10; replacing or the repairing of glass, \$4; painting of casings and doors, \$215; and building insurance, \$193.39.

The Court: Have all those expenditures been necessarily incurred, and have they been paid?

Mr. Boshae: Yes, your Honor, they have been paid, and [124] were found necessary for the proper maintenance of the building.

The Court: You have heard those statements, Mr. Grenier. Are they correct?

Mr. Grenier: Yes, your Honor.

The Court: Very well. Are you willing to stipulate that those expenditures have been reasonably and necessarily incurred?

Mr. Young: I will, your Honor, yes.

The Court: For the upkeep of the property?

Mr. Young: Yes.

The Court: And for the maintenance of it?

Mr. Young: Yes.

The Court: Do you have that itemization written down?

Mr. Boshae: I just have it on a piece of paper here, your Honor. I can put it down.

The Court: You might write it on a paper suitable for an exhibit.

Mr. Boshae: Yes, I will put it down here.

The Court: If you will.

Mr. Boshae: I will hand it to the clerk after I have it itemized.

The Court: Very well.

Mr. Boshae: With the other stipulation, your Honor, that the material allegations of the amendment will be deemed [125] denied by the defendant, I will stipulate.

Mr. Young: So stipulated.

The Court: Very well. Then the amendment to the complaint may be served and filed, and all the material allegations of the amendment are deemed denied.

Mr. Young: I have served counsel with a copy, your Honor.

Mr. Boshae: We will stipulate we have received service of this, your Honor, service of the amendment.

The Court: Very well. You may lay it there, if you will, for the clerk.

Mr. Young: I have the amendment and a copy, your Honor.

The Court: They will be filed. Does the plaintiff have anything further to offer?

Mr. Young: Yes, your Honor. I have located the records from the Security Bank that I wish to introduce in evidence, and I have shown them to counsel, the photostatic copy of the Security-First National Bank account in the name of Dan L. Harley or J. H. Grenier, showing a balance on August 5th of \$2,722.24.

We offer that statement in evidence, your Honor.

The Court: Received in evidence.

(The document referred to was marked Plaintiff's Exhibit 12 and was received in evidence.)

Mr. Young: And we offer a photostatic copy of the [126] Security-First National Bank account, showing the opening of an account by Mr. Grenier on August 5, 1955, and showing the deposit by him on that day of the sum of \$2,749.24.

Mr. Boshae: Of course, your Honor, we will make an objection on the ground it is incompetent, irrelevant and immaterial, and has no bearing to prove or disprove the issues of this case.

The Court: As to all of these documents, it is subject to your objection, but you will stipulate they are genuine in all respects that they purport to be?

Mr. Boshae: Yes, there is no objection to the authenticity of the documents.

The Court: Or to the fact that a copy is used instead of the original?

Mr. Boshae: That is correct.

The Court: The Security Bank statement last received would be Exhibit 12, would it not?

Mr. Young: Yes, your Honor, I believe No. 12.

The Court: And this would be Exhibit 13, comprising two items, does it not?

Mr. Boshae: I take it your Honor has overruled the objection?

The Court: Yes, the objection that it is incompetent, irrelevant and immaterial will be overruled.

(The document referred to was marked Plaintiff's Exhibit 13 and was received in evidence.)

Mr. Young: Now, your Honor, with the exception of Dr. Ogden, the plaintiff has concluded his case.

The Court: Very well.

Mr. Boshae: If the court please, I won't want to prejudice the defendant's right to make a motion to dismiss, and I would like to reserve that opportunity until after——

The Court: Suppose you make the motion now, at the close of the plaintiff's case, or do you want to reserve it until after the plaintiff examines Dr. Ogden?

Mr. Boshae: That is what I thought, your Honor. Probably it would be better.

The Court: Is there any objection?

Mr. Young: No objection, your Honor.

The Court: It will be so reserved.

Mr. Boshae: To reserve it until that time.

The Court: Very well.

Mr. Boshae: Shall we proceed, your Honor?

The Court: Yes.

Mr. Boshae: Mrs. Bretschneider, please.

EVA LEE BRETSCHNEIDER

called as a witness on behalf of the defendant, having been first duly sworn, was examined and testified as follows:

The Court: Will you state your name and address, please? [128]

The Witness: My name is Eva Lee Bretschneider.

The Court: How do you spell that?

The Witness: E-v-a L-e-e B-r-e-t-s-c-h-n-e-i-d-e-r.

The Court: Eva Lee Bretschneider, is that correct?

The Witness: Yes, sir.

Direct Examination

Q. (By Mr. Boshae): Mrs. Bretschneider, what is your business or occupation, please?

A. I am an escrow officer at the Bank of America.

Q. Are you also a notary public?

A. Yes, I am.

Q. Were you a notary public during the year 1955?

A. Yes, sir.

Q. Mrs. Bretschneider, did you have occasion to see or speak to Mr. Daniel L. Harley?

A. Yes, sir.

(Testimony of Eva Lee Bretschneider.)

Q. Would you tell the court when you saw him during 1955, please?

A. Well, the first time I saw him I didn't speak to him, but I saw him when he came into the bank to open an account, and the day I first met him and was introduced to him was the day I——

Mr. Boshae: Just a minute, please. Shall we proceed, your Honor? [129]

The Court: Yes.

Q. (By Mr. Boshae): Go ahead.

A. ——was the day I notarized the deed.

Q. Now, the first time was when, Mrs. Bretschneider, if you can recall?

A. I don't recall the day the account was opened. We have the signature cards, which would give that exact date.

Q. With relation to the date you notarized the deed, can you give us an approximate date or time?

A. Well, it was within a matter of a few weeks, I would say.

Q. A few weeks before you notarized the deed?

A. Yes, a few days or weeks. I don't recall.

Q. Did you observe him at that time?

A. Well, I saw him in there. He was in a wheel-chair with Mr. Grenier, and I did see him, but I didn't speak to him.

Q. Did he appear rational at that time?

A. Yes.

Q. Now, with relation to the time that you said you saw him when the deed was notarized, would

(Testimony of Eva Lee Bretschneider.)

you tell us — first, give us the date, if you will, please?

A. I can look at my book and tell you the exact date.

(Referring to book.) It was on May 16, 1955.

Q. And where did you see him, Mrs. Bretschneider? [130]

A. In his home on Blossom Street.

Q. Was anyone else present when you were there, please?

A. Yes, Mr. Grenier was there, and the nurse was there.

Q. And who? A. The nurse.

Q. Yes. Now, did you talk to Mr. Harley at that time, Mrs. Bretschneider? A. Yes, sir.

Q. Would you tell us what was said?

A. Well, I can't——

Q. What you said, what he said, or what Mr. Grenier said, if he was in your presence?

A. Well, the conversation was going on all the time I was there.

Mr. Grenier came up to the bank, and asked me to go down and notarize this deed at the time, so he took me down in his car.

We went in the house, in the back door, and we went into the dining room or lounge room, where Mr. Harley was.

Mr. Grenier introduced me to Mr. Harley, and said, "This is the lady from the bank," and said, "She will notarize your signature on the deed."

Q. And what did Mr. Harley say, if anything?

(Testimony of Eva Lee Bretschneider.)

A. I believe he said, "Good," but I am not sure.
[131] But he acknowledged it.

Q. Now, did he have the deed in his possession at the time that you were there?

A. Well, he didn't have it the exact moment that we went in. It was laying on a table, or some place in the room. He did have the deed in his possession at the time that he signed it.

Q. And do you know whether he read it?

A. Well, he looked at the deed, but I wouldn't say that he picked it up and read the entire legal description. I don't know, but he did look at it.

Q. And did he sign it in your presence?

A. Yes, he did.

Q. Did anybody assist him in signing it?

A. No.

Q. Now, you observed him at that time, of course, did you not, Mrs. Bretschneider?

A. I did.

Q. Now, in your opinion, did he appear rational or irrational?

A. He appeared rational, in my opinion.

Q. From your observation, did he have control of his mental faculties? A. Yes.

Mr. Young: Just a minute. I object to that and [132] move to strike the answer, and object to that question as calling for a conclusion of the witness.

The Court: She can say whether he appeared so to her, to have control. Is that your question?

Mr. Boshae: Yes, your Honor.

(Testimony of Eva Lee Bretschneider.)

The Court: Did he appear to you to be in possession of his mental faculties at that time?

The Witness: Yes, he did.

Q. (By Mr. Boshae): After he signed it, what did you do, Mrs. Bretschneider?

A. I took the deed from him, and went in the living room and sat on the couch and completed the notary. I signed the notary.

Q. Then what happened after that?

A. Mr. Grenier took me back to the bank.

Q. You were paid for your services, were you not?

A. Yes, I was.

Mr. Boshae: You may cross examine.

Cross Examination

Q. (By Mr. Young): You had not met Mr. Harley prior to the time you went to his house on May 16th?

A. No, sir.

Q. But you had seen him at the bank? [133]

A. Yes.

Q. Had you ever talked to him in the bank?

A. No, not prior to the time that I notarized the deed.

Q. And on the occasion, how many times did you see him in the bank prior to the time you acknowledged the deed?

A. One time prior to the time.

Q. And was he in his wheelchair at that time?

A. Yes, he was.

Q. How far away were you from him?

A. Oh, probably across the lobby. Probably from here to the first row.

(Testimony of Eva Lee Bretschneider.)

Q. That is as close as you got to him?

A. Yes, the first day.

Q. Yes. Then how did you determine from that distance that he was rational at that time?

A. Well, he didn't do anything irrational.

The Court: That distance would be how far, do you estimate, as indicated by the witness, gentlemen? 25 feet?

Mr. Young: 25 feet, yes, your Honor. Is that right?

Mr. Boshae: I don't know.

The Court: She says, as I understood her, from where she sits in the witness box to the first row inside the rail. Is that correct?

The Witness: Yes. [134]

The Court: To the bench just inside the rail. You gentlemen can estimate or measure how far that is.

How far would you estimate? 25 feet?

Mr. Young: Yes, I would, your Honor.

The Court: Mr. Boshae? From where the lady sits on the witness stand to the bar?

Mr. Boshae: I would say it is approximately that, your Honor.

I have now handed the clerk the list, your Honor.

The Court: Of the stipulated expenditures made by the defendant, reasonably and necessarily made by the defendant in the upkeep and maintenance of the property in question?

Mr. Boshae: That is correct.

The Court: Pursuant to the stipulation, it is re-

(Testimony of Eva Lee Bretschneider.)

ceived in evidence as Plaintiff's Exhibit 14, is it, Mr. Clerk?

Mr. Young: Defendant's, I guess it would be, your Honor.

The Court: Oh, no, not Plaintiff's Exhibit. I am sorry. Defendant's Exhibit D, is it not?

The Clerk: No, A, B, C, D, E and F are in evidence.

The Court: Oh, I am sorry. It would be G?

The Clerk: G in evidence.

The Court: What is the amount of those expenditures again?

The Clerk: There is no total on it. [135]

The Court: Didn't you total it?

Mr. Boshae: I have the total here, your Honor. It is \$1,498.93.

The Court: May I write that on Exhibit G, gentlemen?

Mr. Young: Yes, your Honor.

The Court: What is it again?

Mr. Boshae: \$1,498.93.

The Court: Very well.

(The list referred to was marked Defendant's Exhibit G and was received in evidence.)

The Court: Any further questions of this witness?

Mr. Young: Yes. I was waiting for your Honor. Shall I proceed?

The Court: Please.

Q. (By Mr. Young): Had you met Mr. Grenier prior to May 16th? A. No, sir.

(Testimony of Eva Lee Bretschneider.)

Q. Did you see him in the bank on the first occasion that you observed Mr. Harley?

A. Yes, sir.

Q. Mr. Grenier was with him? A. Yes, sir.

Q. Now, on the 16th of May is the occasion when you went to Mr. Harley's home with Mr. Grenier?

A. Yes, sir. [136]

Q. And Mr. Grenier came to the bank to get you; is that right? A. Yes.

Q. And you had never previously had any conversation with Mr. Grenier prior to May 16th?

A. No, sir.

Q. And on May 16th, what did he say to you?

A. He came in and asked me if I would go down and notarize this deed. I told him we did not usually go out and notarize deeds, make a notary, that that was just an accommodation for the customers that came in, and I would not be able to go unless some superior officer sent me.

Q. Did he tell you where he wanted you to go with him?

A. He said down on Blossom Street, within a few blocks.

Q. Did he mention Mr. Harley's name?

A. I don't recall.

Q. Did he show you the instrument he wanted you to acknowledge? A. No, sir.

Q. Then you went from the bank to Mr. Harley's home with Mr. Grenier? A. Yes.

Q. What time of day was it?

A. It was after lunch, and before 3:00 o'clock.

(Testimony of Eva Lee Bretschneider.)

Q. Then when you entered the house, where was Mr. Harley when you saw him?

A. He was sitting in a wheelchair in this dining room.

Q. Did Mr. Grenier introduce you to Mr. Harley? A. Yes, sir.

Q. Then did Mr. Grenier hand you the deed?

A. The deed was lying on some table, or something, and he picked it up and handed it to me, and I——

The Court: Who picked it up?

The Witness: Mr. Grenier.

Q. (By Mr. Young): And how far away was it from Mr. Harley where Mr. Grenier picked it up?

A. Oh, probably six feet.

The Court: Did he say anything to you? Did Mr. Grenier say anything to you?

The Witness: Well, we were talking about the deed, but——

The Court: In the presence of——

The Witness: In the presence of Mr. Harley, yes.

The Court: Did Mr. Harley say anything about it?

The Witness: They were talking, but I don't recall what was said. He seemed to know what was going on.

The Court: What did he say that led you to believe that he knew what was going on?

The Witness: When we went in, he said——

The Court: Who said, now? [138]

The Witness: Mr. Grenier said to Mr. Harley,

(Testimony of Eva Lee Bretschneider.)

he says, "Dan, this is Mrs. Bretschneider. She is the girl from the bank, and she will notarize your signature on the deed."

And Mr. Harley, the best I remember, his word was, "good."

Then they went on talking, but I didn't pay any attention to the conversation that was going on, but there was conversation going on.

Mr. Young: Do we have the original deposition in the courtroom of this witness?

The Clerk: Yes, we do.

Mr. Young: May we have it opened, your Honor, and filed?

The Court: The clerk will open it and file it, and mark it Plaintiff's Exhibit, for identification, next in order.

The Clerk: Plaintiff's Exhibit 14, for identification.

(The document referred to was marked Plaintiff's Exhibit 14 for identification.)

The Court: Do you wish it placed in front of the witness?

Mr. Young: Yes, if your Honor please.

The Court: Will you place it before the witness, Mr. Clerk, Exhibit 14, for identification?

The Clerk: Yes, your Honor.

(The exhibit referred to was placed before the witness.) [139]

Q. (By Mr. Young): I call your attention to page 4, line 1:

(Testimony of Eva Lee Bretschneider.)

“Q. And then when you reached the house what did he show you?”

Will you read that answer, please, before I interrogate you about it, just to yourself?

The Court: Have you read it?

The Witness: Yes, sir.

The Court: Your question.

Q. (By Mr. Young): I will read you your answer:

“A. He introduced me to Mr. Harley, and he showed me the deed. He picked the deed up and showed it to me, and then Mr. Harley was in a wheelchair, and there was a lady there at the time. And they put a board, I think, across his wheelchair, and he laid the deed down on the board and he asked for his pen, and he executed the deed.”

Did you so testify?

A. Yes, sir.

Q. I call your attention to page 7, lines 3, 4, 5 and 6. Will you read that reference, please?

A. Yes, sir.

The Court: Have you finished reading it?

The Witness: Yes, sir.

Q. (By Mr. Young): (Reading): [140]

“Q. Did he say anything to you when he signed it?

“A. No. I don’t recall. All the time I was there we were talking, but I don’t recall him saying anything particularly.”

Did you so testify?

A. Yes, sir.

(Testimony of Eva Lee Bretschneider.)

Mr. Young: May I see the deed, please?

The Court: Plaintiff's Exhibit 1?

Mr. Young: Yes, your Honor.

The Clerk: This is the original (handing document to counsel).

Mr. Young: Will you hand her the original, please, Mr. Clerk?

(The document referred to was handed to the witness.)

Q. (By Mr. Young): Is the deed that has just been presented to you the document that was signed by Mr. Harley, and which you acknowledged on May 16, 1955? A. Yes, sir.

Q. Was that document in the same condition at the time you acknowledged it, as it is now before you?

A. It has stamps on it that it didn't have at that time.

Q. It had no stamps on it at that time?

A. No, sir. It has been recorded. [141]

Q. You are quite certain there were no stamps on it?

A. No, there were no stamps on it.

Q. And you made that observation at that time?

A. Yes, sir.

Q. I call your attention to page 5 of your deposition, if you will refer, please, to that page, starting with line 1, down to line 12.

(The witness examined the document referred to.)

A. Yes, sir.

(Testimony of Eva Lee Bretschneider.)

Q. Are you through? A. Yes, sir.

Q. (Reading):

“Q. I show you what purports to be a photo-static copy of a warranty deed, and ask you whether or not you recognize that instrument as being the one you notarized on the occasion you have mentioned.

“A. Well, it looked like it.

“Q. Were there any stamps on it when you notarized it? “A. I don’t recall.

“Q. So far as the date of the deed is concerned, you have no recollection as to whether it was stamped, whether the Federal stamps which appear to be there were present at that time?

“A. No, I don’t have any recollection.” [142]

Did you so testify?

A. Yes, sir.

Q. Now, after you acknowledged the deed at Mr. Harley’s home, did you see him again later?

A. Yes, I saw him again.

Q. Where did you see him the next time?

A. Well, I am not sure. I think it was in the bank one time, in a wheelchair the next time, and another time I went out and notarized a deed for him,—not a deed, I notarized a power of attorney at the bank in a car, and——

Q. Did you finish?

A. I know I saw him a couple of times inside the bank, but I don’t know whether it was before or after I notarized the power of attorney.

(Testimony of Eva Lee Bretschneider.)

Q. Was Mr. Grenier with him on the occasions that you saw him in the bank after May 16th?

A. Yes, sir.

Q. On all the occasions, when you saw him?

A. Yes, sir, all the occasions.

Q. And on the occasion of the acknowledgment of a power of attorney, does your book that you have there show when that was?

A. Yes, sir. (Examining book.) It was on July 18, 1955.

Q. And what does your record indicate that you acknowledged? [143]

A. A power of attorney.

Q. To whom?

A. It was executed by Daniel L. Harley to Joseph H. Grenier.

Q. On that occasion did Mr. Harley come into the bank? A. No, sir.

Q. Who came into the bank?

A. Mr. Grenier came in the bank.

Q. And what did Mr. Grenier say to you?

A. He asked me if I could come out to the back door, to the car, and notarize an instrument for Mr. Harley.

Q. Did you say to Mr. Grenier to bring Mr. Harley into the bank? A. No, sir.

Q. Did Mr. Grenier tell you how it was that Mr. Harley didn't come into the bank?

A. No, sir.

Q. You went out to the automobile?

A. Yes, sir.

(Testimony of Eva Lee Bretschneider.)

Q. And that was in the rear of the bank, in the parking lot? A. Yes, sir.

Q. And you recognized Mr. Harley in the automobile? A. Yes, sir. [144]

Q. On that occasion did he sign this instrument? A. Yes, sir.

Q. Did you have any conversation with him?

A. Oh, I asked him how he was, and that was about all.

The Court: What instrument? When you refer to "this instrument," what do you mean?

Mr. Young: I mean the power of attorney, yes, your Honor. I beg your pardon.

The Court: Did you so understand?

The Witness: Yes, sir.

Q. (By Mr. Young): But you had no extended conversation?

A. No extended conversation.

Q. You didn't discuss the contents of the power of attorney with him? A. No, sir.

Q. Do you recall reading the power of attorney yourself? A. I glanced at it.

Q. All you did on that occasion was to pass the time of day with him; is that right?

A. Yes, sir.

Mr. Young: That is all, your Honor.

Mr. Boshae: I have just one more question. [145]

Redirect Examination

Q. (By Mr. Boshae): Mrs. Bretschneider, at the time that you notarized the power of attorney,

(Testimony of Eva Lee Bretschneider.)

did you observe Mr. Harley's demeanor and conduct, and his condition at that time?

A. Well, as far as I was concerned, he looked all right, and he was acting rational.

Q. He appeared rational? A. Yes.

Q. Did he appear as though he had control of his mental faculties? A. Yes, he did.

Mr. Boshae: I have no further questions.

Mr. Young: That is all, your Honor.

Mr. Boshae: You may step down.

The Court: Step down.

Mr. Boshae: Thank you very much, Mrs. Bretschneider.

May this witness be excused, your Honor?

Mr. Young: Yes, your Honor, so far as I am concerned.

The Court: She may.

(Witness excused.)

The Court: Your next witness.

Mr. Boshae: Mr. Whitworth, please. [146]

WALTON N. WHITWORTH

called as a witness on behalf of the defendant, having been first duly sworn, was examined and testified as follows:

The Clerk: Will you state your name, please?

The Witness: Walton N. Whitworth.

The Clerk: Is that Whitworth?

The Witness: Whitworth, W-h-i-t-w-o-r-t-h.

Direct Examination

Q. (By Mr. Boshae): Mr. Whitworth, have you know the deceased, Daniel L. Harley?

(Testimony of Walton N. Whitworth.)

A. Yes.

Q. How long have you known him, Mr. Whitworth?

A. Oh, I would say a period of at least 30 years.

Q. And you knew Mr. Grenier? A. Yes.

Q. Did you ever have occasion to visit Mr. Harley during the year 1955?

A. Yes, quite often.

Q. Would you tell the court approximately how often you saw or visited Mr. Harley?

A. Well, prior to Mrs. Harley's death, I would say that we saw him on the average of every three or four weeks. Following Mrs. Harley's death, I would say approximately every two weeks. [147]

Q. Did you engage in any conversations with him, Mr. Whitworth?

A. Yes, in the course of a visit, just as one would in visiting with a sick friend.

Q. Was there any conversation in particular that you recall, or just general conversation?

A. Primarily, general conversation.

Q. Was there anyone ever present when you were there? A. Oh, yes.

Q. Besides Mr. Harley?

A. Yes, Mrs. Studebaker was. As I recall it, she was always there. On, oh, at least three occasions, the attorney who—Mr.—

Q. Mr. Edgar?

A. Mr. Edgar was present, and I think on about —on I think probably three occasions Jimmy Harley was there.

(Testimony of Walton N. Whitworth.)

Q. Did you have occasion to observe Mr. Harley in visiting and talking with him?

A. Oh, yes.

Q. Do you have an opinion as to his mental sanity? A. Well,—

Q. You can just answer that "Yes" or "No."

A. Yes.

Q. Can you tell the court, in your opinion, whether he was mentally sane or insane? [148]

A. In my opinion, he was always sane whenever I saw him.

Q. In your observation, did he appear rational or irrational? A. Rational.

Q. And did he have control of his mental faculties on all of these occasions?

A. As near as I could determine.

Q. In your opinion? A. Yes.

Q. Did he at any time during these visits that you made with Mr. Harley appear irrational?

A. No.

Mr. Boshae: You may cross examine.

Cross Examination

Q. (By Mr. Young): Mr. Whitworth, did you know Mr. Harley in Montana? A. Yes.

Q. How long ago was that prior to the time he died?

A. Oh, approximately 30 years.

Q. And after he came to California, did you see him frequently? A. Yes.

Q. When did he come to California? [149]

(Testimony of Walton N. Whitworth.)

A. I am not exactly sure. I think approximately in '47 or '48, along in there somewhere.

Q. Did you know Mrs. Harley also?

A. Very well.

Q. And your family and the Harley family visited back and forth, did you?

A. My immediate family, yes.

Q. Is that right? A. Yes.

Q. Now, during the year 1955, when would you say is the first occasion that you had any conversation with Mr. Harley?

A. Well, it would be early in the year. As far as an exact date is concerned, I don't know that.

Q. And where did you see him?

A. In his home.

Q. And was Mrs. Harley there? A. Yes.

Q. Did he appear to be well when you saw him in the early part of the year 1955?

A. That is a matter of degree, I presume.

Q. Well, whatever the——

A. If you want to consider me well, in good health, I would say no.

Q. Now, explain what his appearance was in that answer. [150] How did he appear to you, when you saw him in the early part of the year 1955?

The Court: You are referring to his physical aspects now?

Mr. Young: Yes, physical aspects.

The Witness: Well, I would say they were reasonably good.

(Testimony of Walton N. Whitworth.)

Q. (By Mr. Young): Do you know how much he weighed?

A. Well, we used to often kid about that, because of my wife being very slender. I used to wonder which was the heavier, Dan or my wife. He had been slight for a good many years, very slight.

Q. Did he tell you he had been sick with pneumonia during the early part of the year 1955?

A. I don't recall that.

Q. Did he tell you that he had been in the hospital in November of 1954?

A. I am very poor on dates. The only time I recall his being in the hospital is when he had an operation in Burbank in St. Joseph's Hospital.

Q. Did you go to see him when he was in the hospital? A. Yes.

Q. When was that?

A. I think that was considerably earlier. I believe that must have been in 1940—I would rather not venture a guess. [151]

Q. Did he tell you, when you saw him in 1955, in the early part of 1955, that he was suffering from heart trouble?

A. No, I don't recall that he did.

Q. Did he tell you he was having difficulty with his respiratory system, his breathing?

A. Not at that particular time.

Q. Did he tell you in the early part of 1955 that his doctor had told him that he was suffering from arteriosclerosis? A. No, he didn't.

(Testimony of Walton N. Whitworth.)

Q. Well, did he at any time during the year 1955 tell you that he was suffering from heart trouble?

A. Not that I recall.

Q. Were you in Los Angeles or Glendale when Mrs. Harley passed away? A. Yes.

Q. In March?

A. I was in North Hollywood.

Q. Did you visit Mr. Harley around the time that she passed away?

A. Yes, I believe we were in his home the night she passed away.

Q. And on that occasion did he say anything to you with reference to his health? [152]

A. As far as that particular occasion is concerned, I wouldn't say.

Q. Well, on that occasion when you were there, did you make an observation as to his physical being?

A. Well, Dan had gone downhill to some extent, I think, over that period.

Q. That is, from the early part of 1955, that you refer to?

A. From the time that Mrs. Harley was the most ill.

Q. That was the early part of 1955?

A. That's correct.

Q. What do you mean when you say that he had gone downhill?

A. Well, he had, of course, been under a terrific emotional strain because of her illness, and I think it appeared that he had probably lost some weight.

(Testimony of Walton N. Whitworth.)

Q. What observation did you make on that occasion about his alertness?

A. In my opinion, Dan was always very alert.

Q. On the occasion we are referring to, when you were there after Mrs. Harley died?

A. Yes.

Q. Did you ever discuss any of his business affairs with him? A. No. [153]

Q. What would be the general topic of your conversation?

A. Well, primarily, old times. We went over there, of course, with the main idea of trying to cheer Dan up, and relieve some of this strain he was under, and so forth, and he loved to reminisce about the old times in Montana, and the people we both knew, and conversations of that nature.

We discussed frequently the goings-on we read about in the home town newspapers, to which we both subscribed, and things of that nature.

I never delved into Dan's personal affairs. I thought it was none of my business, and if he wanted to give me that information, he would volunteer it.

Q. He never said anything to you about his personal affairs? A. That's right.

Q. Do you know Mr. Grenier?

A. Very well.

Q. And Mr. Harley never told you that he had deeded some property in Montana to Mr. Grenier,— A. No.

Q. —on any of these occasions you visited

(Testimony of Walton N. Whitworth.)

with him? A. No.

Q. By the way, you were named as executor in the will of July 28, 1955, weren't you? [154]

A. Yes.

Q. And you declined to act?

A. That's right.

Q. Is that right? A. That's right.

Q. After Mrs. Harley passed away, Mr. Harley appeared to you to be quite depressed, didn't he?

A. Certainly, to the extent that anyone might expect a husband to be, yes.

Q. And that is one of the reasons you went to call on him, because he appeared to you to be depressed?

A. We expected him to be depressed.

Q. And when you refer to his being depressed, you mean he was depressed mentally; isn't that right?

A. No, I mean by being depressed, depressed emotionally.

Q. Well, how did he react when you were there that gave you that impression?

A. He was naturally upset, as anyone would be who loved a wife who had passed away.

Q. And in these conversations you had with him after his wife passed away, you concluded that he was a heartbroken man over the loss of his wife, didn't you?

A. I felt that he was deeply — felt the loss deeply.

Q. And he told you, did he not, on several [155]

(Testimony of Walton N. Whitworth.)

occasions after his wife passed away, that he wanted to die himself?

A. No, he didn't state that.

Q. He never told you that. After his wife passed away, on these visits you made to his home, where would he be when you entered the home?

A. Usually on the davenport in the living room.

Q. Did you ever see him in bed?

A. Once.

Q. Just once. When was that?

A. I believe it was the next to the last visit.

Q. When was the next to the last visit?

A. Well, the last visit was approximately about the 19th of July. The one prior to that was probably about two weeks prior.

Q. You never saw him in bed except one time?

A. That's all that I recall.

Q. How many times did you see him in his wheelchair?

A. I don't recall seeing him in his wheelchair.

Q. He was usually lying on the couch?

A. Right.

The Court: Was he clothed?

The Witness: In his pajamas and robe.

Q. (By Mr. Young): After his wife passed away, on these visits that you made, did you ever see him dressed in his clothes? [156]

A. I believe so.

Q. When?

A. I would venture the opinion that he was

(Testimony of Walton N. Whitworth.)

dressed on two or three occasions within the first month or two after his wife died.

Q. Did you know or meet Mrs. Studebaker, the nurse? A. Yes.

Q. Now, this condition, that he was grieved over the loss of his wife, that continued down to the last time you saw him, did it?

A. I don't recall that he expressed it particularly.

Q. Did he tell you on any of these occasions after his wife passed away, that he was going to marry the nurse? A. No.

Q. He didn't say that to you?

A. No, not that I recall.

Mr. Young: He never—I withdraw that. That is all.

Mr. Boshae: No further questions.

The Court: You may step down, Mr. Whitworth.

(Witness excused.)

The Court: The next witness.

Mr. Boshae: Mr. Miller. [157]

WILLIAM L. MILLER

called as a witness on behalf of the defendant, having been first duly sworn, was examined and testified as follows:

The Clerk: Will you state your name, please?

The Witness: William L. Miller.

The Clerk: Be seated, please, Mr. Miller.

Mr. Boshae: If the court please, may Mr. Whitworth be excused?

Mr. Young: Yes, your Honor.

The Court: He may.

Direct Examination

Q. (By Mr. Boshae): Mr. Miller, what is your business or occupation? A. At present?

Q. At present. Let's refer to the year 1955.

A. I was in the sick room supply business.

Q. Did you know an individual by the name of Daniel L. Harley? A. I did.

Q. And also a Mr. Grenier? A. Yes, sir.

Q. When did you first see Mr. Harley, Mr. Miller, during the year 1955?

A. I was called to take oxygen to his residence. If I recall correctly, it was about the middle of April, of 1955. [158]

Q. And how often did you go there after the first time that you visited his home?

A. I serviced him with oxygen, I would say, roughly, about three times a week on an average.

Q. Did you have occasion at the time you would see him to talk to him, Mr. Miller?

A. Quite frequently.

(Testimony of William L. Miller.)

Q. Could you tell the court what the nature of your conversation would be when you would see him?

A. Usually general topics. Quite frequently he would be interested in the particular machine that he was using; some magazine article; things in general.

Q. Did you have occasion during these visits to observe his conduct, and the way he acted?

A. Yes, I did.

Q. Now, did he appear to you to be rational or irrational during these visits?

A. To me he appeared to be completely rational.

Q. And did he appear to you to be in control of his mental faculties?

A. As far as I can recall, on every occasion.

Q. And so far as you can recall, did he appear to you that he could see?

A. I am not an optometrist, but as a lay person I was [159] amazed at his facilities so far as sight was concerned.

Q. Did he recognize you whenever you went there? A. Even across the room.

Q. And when was the last time that you saw him, Mr. Miller?

A. A few hours before he died.

Q. Before he passed away?

A. That's right.

Q. How was he attired when you would see him during these visits?

A. Sometimes he would be in his own room, at-

(Testimony of William L. Miller.)

tired in his pajamas. Sometimes he would be in the living room, and attired in his robe. I would call at various times. It would vary. The hour of the day would vary when I would be there.

Mr. Boshae: You may cross examine.

Cross Examination

Q. (By Mr. Young): Mr. Miller, you were connected with the Alert Ambulance Company?

A. I was the Alert Ambulance Company.

Q. You were the Alert Ambulance Company?

A. Yes, sir.

Q. And what did you do for Mr. Harley, insofar as your [160] company was concerned?

A. We supplied him with oxygen.

Q. Do you have any records with you to show how much oxygen you supplied him with?

A. No, I do not.

Q. Who told you to supply him with oxygen?

A. I think he had been getting oxygen from some other company. I don't recall at present which company. There was something in connection with a failure in service, and I was called.

Q. Who called you? The doctor?

A. I was called by the nurse.

Q. By Mrs. Studebaker? A. Yes.

Q. Did the doctor give you any orders as to how much oxygen to send over to Mr. Harley?

A. The doctor gave orders as to the quantity of oxygen he was to use.

Q. What do you mean by "quantity"?

(Testimony of William L. Miller.)

A. Whenever he would take the oxygen, how much he was to take at that particular time.

Q. Did the doctor tell you that?

A. He left orders to that effect.

Q. You didn't give him the oxygen yourself, did you?

A. Do you mean, did I administer the oxygen to him? [161]

Q. Yes. Did you set the gauge on the oxygen?

A. The gauge was set by the doctor, as far as I know.

Q. By the doctor. Do you know Dr. Ogden?

A. Only by reputation.

Q. Have you talked to him in the home of Mr. Harley? A. Not that I recall.

Q. What was Mr. Harley doing with this oxygen?

A. Would you restate the question?

The Court: He was breathing it, wasn't he?

The Witness: Yes.

The Court: When were you called there?

The Witness: You mean the first time?

The Court: Yes.

The Witness: It was in the middle of April sometime.

The Court: And you say you serviced him two or three times a week?

The Witness: Something like that.

The Court: Would you be able to estimate from the quantity of oxygen you took there, how long a period of time it would take him to consume it?

(Testimony of William L. Miller.)

The Witness: This is rather a medical problem, your Honor.

The Court: Did he have a tent there, an oxygen tent?

The Witness: No, he did not.

The Court: He took it with a mask, did he?

The Witness: He took it with what is known as a Bennett Positive Pressure breathing machine.

The Court: Now, you say you served him two or three times a week. Would you be able to estimate how long he would breathe that oxygen before he used it all up? How many hours or days?

The Witness: Well, if I can express it, it is like anticipating how much water you would use in a given month. It is a little bit hard to tell. Sometimes you take it at a greater rate, sometimes at a reduced rate.

The Court: I am assuming, and I suppose you have some idea of the rate at which he was using it, and you have some idea of what you gave him, and I thought by an arithmetical process you would be able to estimate, say, how many hours a day he spent consuming that oxygen, or how many minutes, or whatever it was.

The Witness: Well, usually, they spend about a half an hour, 20 minutes to half an hour four to five times a day with the treatment of the machine. Then they can take oxygen intermittently, as required between these particular treatments.

The Court: Whenever they feel the need of it?

The Witness: Whenever they feel the need of it.

(Testimony of William L. Miller.)

And if I recall correctly, I would have records to show, I would take an average of two tanks a trip, or such a matter. [163] Sometimes it would be three.

The Court: Would you say that indicated a frequent use or an infrequent use?

The Witness: Well, anyone who requires a Bennett Positive Pressure breathing machine does use oxygen much more frequently than the average person who uses it through a mask. That is because it takes oxygen to flush the machine. If you understand the principle of the old hydraulic ram, it takes oxygen to operate the machine, as well as to supply it to the person.

The Court: That machine, is that used in more serious cases or less serious cases than a tent?

The Witness: Well, this again is a medical thing, and——

The Court: Well, perhaps you are not qualified to answer.

The Witness: As I say, I only supply the oxygen. A tent is used usually for a different type of complaint.

Q. (By Mr. Young): On April the 9th is when you took the first oxygen to Mr. Harley, is that right?

A. If I recall correctly. My records would show it.

Q. Do you have records showing all these deliveries?

A. Yes.

(Testimony of William L. Miller.)

Q. How much did a tank of oxygen cost? What did you bill him for it?

A. Oh, I didn't look that up. I gave him a rate on so many tanks. [164]

Q. Isn't it a fact that from April the 9th to May 17th you billed him for \$82.97 worth of oxygen? A. From when?

Q. From April 9th, the first time you delivered oxygen to him, to May 17th, \$82.97?

A. I would have to consult my records. I don't recall.

Q. Did you deliver oxygen to him on April 9th?

A. If I recall correctly.

Q. And April 14th?

The Court: He said about three times a week.

Q. (By Mr. Young): Isn't it a fact that from June 2nd to July 20th you delivered oxygen to him amounting to \$347.76?

A. If you need the exact amounts, I can supply them. It would take me a while to do that.

Q. Isn't it a fact that on July 2nd you delivered oxygen to him?

The Court: He said about three times a week. Isn't that close enough?

Mr. Young: Well, I guess so. Sometimes you have got it here every day, or every other day, but that is all right.

Q. Were you in Mr. Harley's home on the 28th of July, 1955? A. I was. [165]

Q. Did you have a conversation with him that day? A. Yes.

(Testimony of William L. Miller.)

Q. Where was he when you had that conversation? A. He was in the front room.

Q. Was he lying down or sitting in his wheelchair?

A. He was sitting on the davenport.

Q. Who else was there?

A. Well, his nurse was in constant attendance, and somebody had come to visit him that day. I think—let's see—was that on a Thursday?

Q. The 28th, yes, was on a Thursday.

A. Yes, I was there.

Q. You delivered oxygen that day?

A. Yes.

Q. You witnessed a will on that day, didn't you?

A. Does this have any bearing on this?

The Court: Just answer the question, Mr. Miller. Did you witness a will on that day?

The Witness: Yes.

Q. (By Mr. Young): This machine that you have referred to, this oxygen machine, did Mr. Grenier give that to you? A. No.

Q. Who did?

A. Nobody gave it to me. It is in my possession at present because there are a few things that would have been [166] necessary to have put it in the hands of anybody else, so he told me—Mr. Grenier told me to take care of it until I was ordered to do anything else with it.

Q. How much did you charge for that machine?

A. I charged nothing.

(Testimony of William L. Miller.)

Q. To Mr. Harley?

A. I didn't charge him anything.

Q. You didn't sell it to him? A. No, sir.

Q. Where did he get it? A. I don't know.

Q. What is the machine worth? A. Today?

Mr. Boshae: Your Honor, I am going to object to that as being incompetent, irrelevant and immaterial, as to what the machine is worth.

The Court: Overruled. Can you give us an estimate?

The Witness: Of the worth of the machine?

The Court: Yes, the reasonable value, the market value.

The Witness: New, or in the condition it is in?

The Court: As it is.

The Witness: I would say about \$85.

Q. (By Mr. Young): And when was it turned over to you?

A. I don't recall. It was some time after his demise.

Q. Mr. Grenier gave it to you, or told you to take it? [167]

A. Well, he told me to take care of it. I did say I would.

Q. And you have been taking care of it ever since? A. Yes.

Q. You haven't turned it over to the administrator of Mr. Harley's estate? A. No, sir.

Q. Do you still have it in your possession?

A. Yes, sir.

Q. You didn't sell it? A. No, sir.

(Testimony of William L. Miller.)

Q. Have you leased it out? A. No, sir.

Q. Have you been paid any money after Mr. Harley's death in connection with any of your statements by Mr. Grenier?

A. I think one of the checks that was supposed to clear the bank did not clear because of his demise, before the check got to the bank, and I think that was——

Q. What happened? Did Mr. Grenier give you some money?

A. I think that check was re-covered.

Q. Was what? A. Re-covered.

The Court: You mean by that, Mr. Grenier made it good? [168]

The Witness: It was made good by the estate.

Q. (By Mr. Young): Made good by whom?

A. Well, I suppose it was by his estate.

Q. Well, do you know whether it was made good by the estate, or whether Mr. Grenier paid it?

A. I don't recall.

Q. Whose check did Mr. Grenier give you,—his, when he paid it?

The Witness: Your Honor, this is over a year ago. I don't remember.

The Court: If you don't remember, just say so.

The Witness: I don't remember.

Q. (By Mr. Young): How much was the amount of the check?

A. I would have to look at my records.

The Court: About how much? Have you any idea?

(Testimony of William L. Miller.)

The Witness: I think probably between \$75 and \$100.

The Court: Between \$75 and \$100. Anything further from this witness?

The Witness: It covered some of the oxygen.

Q. (By Mr. Young): Between \$75 and \$100?

A. Something in there. I don't remember exactly. I can't tell you. I could tell you exactly if you would let me look at my records.

Mr. Young: Fine. Then if you will do that, I would appreciate it. [169]

The Court: Let's not have the witness come back, unless it helps you. It doesn't help me.

Mr. Young: All right.

The Witness: It might vary \$50, or it might vary \$25.

Mr. Young: Very well. That is all.

The Court: Anything further of this witness?

Mr. Boshae: I have just one matter. I didn't quite follow the question, your Honor. I think Mr. Young asked him if he was given any money for the statements.

Were you referring to the statements for his services, or for his testimony?

Mr. Young: That is a matter of inference or deduction, as to what he was given the money for.

The Court: The witness answered that a check that was given by the decedent, I assume, or was it given you by Mr. Harley before his death?

The Witness: The check was for oxygen which

(Testimony of William L. Miller.)

he received before his death, and then by the time it was to clear the bank, they stopped payment.

Redirect Examination

Q. (By Mr. Boshae): Were you ever given any money for testifying? A. No sir, never. [170]

Mr. Boshae: That is what I wanted to clear up. No further questions.

The Court: You may step down. Is there any occasion to require the further attendance of Mr. Miller?

Mr. Young: Not from me, your Honor.

Mr. Boshae: No, your Honor.

The Court: You are excused.

(Witness excused.)

The Court: Your next witness.

Mr. Boshae: Mrs. Gordon.

JESSIE B. GORDON

called as a witness on behalf of the defendant, having been first duly sworn, was examined and testified as follows:

The Clerk: Will you state your name, please?

The Witness: Jessie B. Gordon.

The Clerk: Be seated, please.

Direct Examination

Q. (By Mr. Boshae): Mrs. Gordon, have you ever known a gentleman by the name of Daniel L. Harley? A. Yes.

Q. Did you know him during the year 1955?

A. Yes, I did.

(Testimony of Jessie B. Gordon.)

Q. How long had you known him prior to that time?

A. Thirty-odd years, more or less. [171]

Q. Did you know him in Montana?

A. That's right.

Q. Now, how often did you have occasion to see him during 1955, Mrs. Gordon?

A. Approximately every — once every three weeks.

Q. Were you related to him in any way?

A. No.

Q. You also know Mr. Grenier; is that right?

A. That's right.

Q. Where did you first become acquainted with Mr. Harley?

A. In Montana; Deer Lodge, Montana.

Q. I don't know whether I got your answer or not, but how often did you have occasion to see Mr. Harley during 1955?

A. Approximately once in every three weeks.

Q. During that time did you talk to him?

A. Oh, certainly, yes.

Q. You would visit him at his home, is that correct?

A. That's right.

Q. On the occasions when you would go there, where would he be, Mrs. Gordon?

A. Shortly after Mrs. Harley died, when I came in he was sitting at his desk fully clothed, writing out checks and attending to business. That was on one occasion I [172] remember, and another occasion I recall he came from the bedroom, walked out

(Testimony of Jessie B. Gordon.)

from the bedroom. And on two or three occasions he was sitting on the davenport in the living room.

Q. Now, are you able to form an opinion as to his mental sanity, Mrs. Gordon?

A. I certainly am.

Q. Would you say that he was mentally sane or insane?

A. Very sane.

Q. And did he appear to you to be rational or irrational?

A. Rational.

Q. Did he appear to have control of his mental faculties?

A. Very much.

Q. Could he talk clearly?

A. Very much so, very clearly.

Q. And was there anything in your observation of Mr. Harley that would cause you to feel that he couldn't see?

A. None; nothing.

Q. What would be your general discussion, Mrs. Gordon, if you can recall, when you would see him?

A. Of course, Dan was very fond of Montana, and we usually recalled instances in Montana, and he was always interested in my mother, how her health was, and what my husband was doing. It was just general conversation. [173]

Q. Did he ever speak to you about conveying any property in Montana?

A. No, no.

Q. And how late—at what time prior to his death—when was the last time you saw him?

A. Mother and I both visited him, it was either a Tuesday or Wednesday before he died on Saturday. It was one of those days.

Q. You saw him at that time?

(Testimony of Jessie B. Gordon.)

A. That's right. Mother and I visited him.

Q. Other than his general physical condition, did he appear rational or irrational at that time?

A. Rational.

Q. Did you talk to him then?

A. Yes. Mother and I discussed how unusually sharp he was that night. Mother hadn't seen him, because she is aged.

Mr. Young: I move to strike that answer, what she and her mother discussed.

The Court: Motion granted.

Q. (By Mr. Boshae): Did you speak to each other in front of Mr. Harley, or was this outside of his presence?

A. Outside of his presence, naturally.

Mr. Boshae: You may cross examine. [174]

Cross Examination

Q. (By Mr. Young): You are acquainted with Mr. Grenier, too, I take it, Mrs. Gordon?

A. Mr. Grenier?

Q. Yes. A. Yes.

Q. Are you related to him?

A. Not at all.

Q. Did you know him in Montana?

A. I did.

Q. Was he ever present when you were visiting Mr. Harley's house? A. Yes.

Q. On how many occasions when you were there was he present? A. I would say three.

(Testimony of Jessie B. Gordon.)

Q. Did you see Mr. Harley on May 16, 1955?

A. I don't know.

Q. Did Mr. Harley ever tell you he had given any property to Mr. Grenier? A. No.

Q. Ever tell you he had deeded any property to Mr. Grenier? A. No. [175]

Q. Did he ever discuss any of his business affairs with you at any time? A. No.

Q. Your meetings and conversations were purely social; is that right? A. Yes, sir.

Q. Did he tell you that he was going to marry his nurse, Mrs. Studebaker? A. No.

Q. Did she ever tell you that she was going to marry him? A. Yes.

Q. She told you that, didn't she? A. Yes.

Q. Did you talk to Mr. Harley about it?

A. Mr. who?

Q. Mr. Harley? A. No.

Q. After Mrs. Studebaker told you she was going to marry him, did you say anything to Mr. Harley about it?

A. I didn't know about it until after Mr. Harley died.

Q. This was after he passed away?

A. That's right.

Mr. Young: That is all.

Mr. Boshae: No further questions.

The Court: You may step down, Mrs. Gordon.

Mr. Boshae: May this witness be excused?

The Court: She may. You are excused.

(Witness excused.)

The Court: Your next witness.

Mr. Boshae: I will call Mrs. MacMartin, please.

PEGGY MacMARTIN

called as a witness on behalf of the defendant, having been first duly sworn, was examined and testified as follows:

The Clerk: Will you state your name, please?

The Witness: My name is Peggy MacMartin.

The Clerk: Peggy what?

The Witness: MacMartin.

The Clerk: MacMartin. Is that M-c-M-a-r-t-i-n?

The Witness: M-a-c-M-a-r-t-i-n.

Direct Examination

Q. (By Mr. Boshae): Mrs. MacMartin, what is your business or occupation?

A. I am a nurse.

Q. Did you have occasion to attend Mr. Harley during 1955, Daniel L. Harley? A. Yes, I did.

Q. And also to his wife, Mrs. Tess Harley, prior to her death? [177] A. Yes.

Q. Now, when were you attending them, or were you at that home, Mrs. MacMartin?

A. I was first called to the home the day that Mrs. Harley died. I was called in at 7:00 o'clock in the morning, to relieve Mrs. Studebaker.

Q. I see. Was Mr. Harley there?

A. Yes, he was.

Q. Have you ever seen Jim Harley, his nephew?

A. At that time, no.

(Testimony of Peggy MacMartin.)

Q. Now, how long did you remain in attendance there, Mrs. MacMartin?

A. About four days, I believe.

Q. Did you ever go back there again after the four-day period?

A. Oh, yes, I used to go back to visit Mrs. Studebaker, who was a friend of mine.

Q. I see. On those occasions when you would go to visit Mrs. Studebaker, would you see Mr. Harley?

A. Yes, he was always there.

Q. All right. Now, how often would you say you went to see Mrs. Studebaker, you went to the home of Daniel L. Harley?

A. Oh, perhaps six times between the time his wife died and when Mr. Harley died. [178]

Q. When you would go to Mr. Harley's home, did you ever talk to Mr. Harley?

A. Oh, I always did. Mr. Harley would come to the door, and would usually invite me in, and if Mrs. Studebaker was busy, I would sit down and talk with him, and pass the time of day, and we would have a little conversation before Mrs. Studebaker was available.

Q. Do you recall any particular conversation that you had with Mr. Harley?

A. No, not any particular one. We used to just have a general social conversation, where we would talk about current things. He was a very interesting person and very cheerful.

Q. When was the last time that you saw him, Mrs. MacMartin?

(Testimony of Peggy MacMartin.)

A. I was with Mr. Harley the morning that he died.

Q. You were with him? A. Yes, I was.

Q. Now, have you ever seen him read a newspaper?

A. Oh, yes. He always was sitting on the couch there, and by the window, and had his newspapers and his books around him. He read quite a bit.

Q. Did you ever discuss any of the matters that——

A. Yes. Yes, I did.

Q. Now, were you able to form an opinion, [179] Mrs. MacMartin, as to whether or not he appeared to you to be rational or irrational?

A. He appeared to me to be very rational.

Q. Did he appear to you to have control of his mode of speech, and his mental faculties?

A. Yes. He talked quite a bit, and everything he said made sense, in other words.

Q. Did he appear that way the last time you saw him?

A. No. I was called in the night before Mr. Harley died, and at that time he did not know me.

Q. Did he ever discuss his business affairs with you?

A. No, I don't ever remember him discussing his business affairs with me.

Q. Just general conversation.

A. Just general conversation.

Q. Do you know whether or not he could walk?

A. Oh, yes. Of course, he used to walk to the

(Testimony of Peggy MacMartin.)

table. I have had lunch a time or two there with Mrs. Studebaker and Mr. Harley, and he walked to the table.

Q. How late can you recall that he was walking during the times that you were visiting there?

A. The end of July there, a day or two before he died.

Mr. Boshae: You may cross examine. [180]

Cross Examination

Q. (By Mr. Young): Mrs. MacMartin, you were called to Mr. Harley's home on March 20th?

Mr. Boshae: Excuse me, Mr. Young. Your Honor, the clerk, the deputy clerk of the Superior Court wanted to be excused, and I didn't know. So far as I am concerned, he may be excused.

Mr. Young: That is all right.

The Court: Have you gentlemen been keeping him here all this time?

Mr. Young: Well, your Honor, it is still probably necessary to refer to this file with this witness, unless counsel will stipulate that this witness was a witness to the will of July 28th.

Mr. Boshae: Who was?

Mr. Young: Mrs. MacMartin.

Mr. Boshae: Ask her, counsel.

Q. (By Mr. Young): Did you witness a will in the home of Mr. Harley on the 28th of July?

A. Yes, I did.

Q. And you were there that day visiting Mrs. Studebaker?

A. Yes.

(Testimony of Peggy MacMartin.)

Mr. Young: You may have the file, so far as I am concerned. [181]

The Court: Then the witness from the court is excused.

Q. (By Mr. Young): Mrs. Studebaker is the one that sent for you to come to the Harley home, didn't she?

A. No, she didn't send for me. I used to go visit Mrs. Studebaker whenever I had occasion to be in Burbank or Glendale. I dropped in to see them. Most of the time Mrs. Studebaker didn't know when I was coming.

Q. I am referring to the time when you went to Mr. Harley's home professionally, and you were there four days, as I understand your testimony, as a nurse.

A. That was when Mrs. Harley died.

Q. Yes. Who sent for you on that occasion?

A. Mrs. Studebaker said that she had been authorized by the doctor to call another nurse, and she called me.

Q. During the four days you were there, Mr. Harley had a stroke, didn't he?

A. Not that I recall.

Q. Not that you recall. Are you sure about that?

A. I am sure about it. I don't remember.

Q. Isn't it a fact that while you were there, in fact, on March the 22nd, he had a stroke and fell to the floor?

A. I don't remember.

Q. Do you remember picking him up off the floor during the four days you were there?

(Testimony of Peggy MacMartin.)

A. No, I don't. It has been a long time ago.

Q. Yes. Do you know where Mrs. Studebaker is now?

A. The last I heard of Mrs. Studebaker, she was in Bakersfield.

Q. Now, after the four days that you were there, when was the next time that you saw Mr. Harley?

A. Oh, I dropped in—not professionally, but I dropped in to see Mrs. Studebaker probably in another week or two. I don't remember the exact date.

Q. Did you ever discuss with Mrs. Studebaker Mr. Harley's condition, physical condition?

A. We did at the last, the last night I was there.

Q. That is the night before he died?

A. Yes.

Q. He was unconscious then, when you saw him?

A. Yes.

Q. Isn't it a fact that Mrs. Studebaker told you that Mr. Harley had not been out of his wheelchair for a period of two months before he died?

A. No. Mrs. Studebaker——

Mr. Boshae: I object to that, your Honor, as calling for hearsay, unless the deceased was there or Mr. Grenier was present.

The Court: She said "No." Do you want the answer stricken?

Mr. Boshae: No. [183]

The Witness: I don't remember seeing Mr. Harley in a wheelchair.

(Testimony of Peggy MacMartin.)

Q. (By Mr. Young): At any time?

A. At any time.

Q. That was during the entire period from the time you went there on March 20th until he died, when you saw him?

A. Yes. I don't remember.

Q. You never saw him in a wheelchair at all?

A. He was always sitting on the couch over there by the window.

Q. And you observed him during that period walking around himself? A. Yes.

Q. When was the last time you observed Mr. Harley walking?

A. I think the last day I was there before I was called in at the time of his death.

The Court: How long was that before his death?

The Witness: About two days.

The Court: Anything further?

Mr. Young: No, that is all.

Mr. Boshae: I have nothing further.

The Court: You may step down, and you are excused, Mrs. MacMartin.

(Witness excused). [184]

The Court: Your next witness.

Mr. Boshae: Mr. Jack Jenkins.

JACK R. JENKINS

called as a witness on behalf of the defendant, having been first duly sworn, was examined and testified as follows:

The Clerk: Will you state your name, please?

The Witness: Jack R. Jenkins.

The Clerk: Be seated, please, Mr. Jenkins.

Direct Examination

Q. (By Mr. Boshae): Mr. Jenkins, did you know Mr. Daniel L. Harley, the deceased?

A. I did, yes.

Q. How long had you known him prior to his death? A. Oh, 40, 45 years.

Q. Did you also know Mr. Grenier?

A. Yes, I did.

Q. Where did you first become acquainted with him, Mr. Jenkins? A. Butte, Montana.

Q. From the time that Mr. Harley came from Montana to California, how often did you have occasion to see Mr. Harley, Mr. Daniel Harley?

A. Well, it wasn't too frequently up until the [185] time Mrs. Harley got real sick, and then we visited him quite often.

Q. How often would you say was quite often, approximately?

A. Well, sometimes once a week, and maybe once every three weeks. I was working Sundays at that time, and working considerable overtime, and sometimes I would be off, and sometimes I wouldn't.

Q. Did you at the time you would visit Mr. Harley have occasion to observe his conduct and his method of speaking? A. Yes, I did.

(Testimony of Jack R. Jenkins.)

Q. Could you tell the court from your observation whether he could see? A. Yes.

Q. When was the last day you saw him, Mr. Jenkins?

A. Well, it was—I didn't see Dan after the 1st of July.

Q. You didn't see him after the 1st?

A. No.

Q. All right. Then prior to the 1st of July, did you form an opinion as to his mental sanity?

A. Yes.

Q. You can just answer that "Yes" or "No."

A. Yes.

Q. Could you tell the court whether or not, in your opinion, he was mentally sane or insane? [186]

A. I would say he was sane.

Q. And, Mr. Jenkins, what would you talk about when you would see Mr. Harley?

A. Well, just reminiscing old times around Butte, and just things in general, like some magazine article, or some other thing like that, baseball, a little baseball.

Q. And how was he dressed when you would go to visit him?

A. Well, he was dressed, yes.

Q. Did he have his clothes on, or did he have a robe or pajamas, or just what did he have?

A. No, he would generally have his pants on, and a jacket.

Q. And where would he be when you would go in there?

(Testimony of Jack R. Jenkins.)

A. Sometimes he would be sitting at a desk, and sometimes lying on a lounge.

Q. Did you ever have a conversation with him, Mr. Jenkins, concerning his business affairs or his property?

A. Well, the conversation wasn't directly with me, but I did hear the conversation one day. It was my wife and my sister were there, and the conversation came up, something about that he wasn't satisfied with the will, and he wanted Joe to have the property in Deer Lodge. That's all I know.

Q. To whom was he addressing it? To whom was he talking? [187]

A. To my sister.

Q. Oh, I see. Was there any other time that you heard him say that?

A. Well, I heard him say frequently after that that he wanted—that Joe and he had been such good friends, and that he wanted Joe to have the property in Deer Lodge.

Q. How late would you say that conversation or that statement took place, as much as you can recall?

A. Well, I would say that took place almost the last time I saw him.

Q. In your opinion, Mr. Jenkins, would you say that he was rational or irrational?

A. I would say that he was rational.

Q. In your observation, would you say that he had control of his mental faculties or not?

A. I would say he would.

(Testimony of Jack R. Jenkins.)

Q. And would he speak normally?

A. Yes, he would.

Q. From the time you first knew him until the time of your last visit, did he ever react abnormally from previous occasions? A. What?

Q. Did he act the same up to the last time you saw him? A. Yes. [188]

Mr. Boshae: You may cross examine.

Cross Examination

Q. (By Mr. Young): Are you related to Mr. Grenier? A. No, sir.

Q. You knew him in Montana, though?

A. Yes, sir.

Q. You are a friend of his?

A. Well, I never met Joe personally—I never met him until about four or five years ago, but I have known of him and knew of him I would say the last 40 years.

Q. When was the last time you saw Mr. Harley alive?

A. Oh, just before the 1st of July, around in there.

Q. Did you call on him on that occasion alone?

A. No, sir.

Q. Who was with you? A. My wife.

Q. Did you always take your wife with you to see him? A. Yes, sir.

Q. You never went alone? A. No, sir.

Q. Now, this conversation that you overheard with reference to wanting Joe to have the prop-

(Testimony of Jack R. Jenkins.)

erty, when did that take place, the first conversation? [189]

A. That took place right after Mrs. Harley's death.

Q. Right after she died. Where did it take place? A. Over at Dan's house.

Q. And who was there?

A. My wife and my sister.

Q. And who else?

A. Well, possibly the nurse was there.

Q. Was Mr. Grenier there? A. No, sir.

Q. Was Mr. Edgar there? A. No, sir.

Q. On that occasion were you talking to Mr. Harley or was your wife talking to him, or your sister?

A. Well, the conversation was in general. The four of us was sitting there.

Q. What led up to this statement that you say he made? What were you talking about?

A. I think how the conversation come up, there was some remark that Dan had said to my sister about an estate that she had in Detroit. He asked her how she came out with some property, or something, that she had in Detroit, and I think that's how the conversation come up.

Q. What brought Mr. Grenier's name into the conversation?

A. Well, the way that things were, why, Joe— [190] or, Dan said that he and Joe had been such good friends, and they had been partners for years,

(Testimony of Jack R. Jenkins.)

that he wanted Joe to have the property in Deer Lodge.

Q. To have all the property in Deer Lodge?

A. Yes, the property in Deer Lodge.

Q. Did he say he had made a will, in which he had left his friend Joe a half interest in the Deer Lodge property?

A. No, the will wasn't mentioned.

Q. Did he say anything about a will?

A. Only that one will that was made up, that he was dissatisfied with it.

Q. This was what he said in this conversation in March of 1955, that he was dissatisfied with the will?

A. Well, I don't know when it was. It was after Mrs. Harley's death.

Q. Did he say on this occasion you have referred to, that he had already deeded the property to Mr. Grenier? A. No.

Q. He never did tell you at any time he deeded it to him, did he? A. No, sir.

Q. What he told you was he wanted him to have it? A. That's right.

Q. That's right, isn't it? [191]

A. That's right.

Q. That was the last time you saw him when the subject matter was discussed, all that he said was he wanted him to have it, didn't he?

A. That's right.

Q. He never said he had already deeded it to him? A. No.

(Testimony of Jack R. Jenkins.)

Mr. Young: That is all.

Mr. Boshae: I have no further questions.

The Court: You may step down, Mr. Jenkins.

(Witness excused.)

The Court: Do you have another witness?

Mr. Boshae: That is about it, your Honor.

The Court: Does the defendant rest?

Mr. Boshae: We will rest, with the exception of——

The Court: Of the doctor?

Mr. Boshae: Of the doctor, your Honor.

The Court: Very well. When will the doctor be here tomorrow morning?

Mr. Boshae: I have instructed him to be here at 9:30.

The Court: Very well. Is there any objection to resuming at 9:30?

Mr. Young: None at all, your Honor.

The Court: Very well.

We will recess the trial until tomorrow morning at 9:30. [192]

(Whereupon, at 4:55 o'clock p.m., Wednesday, October 31, 1956, an adjournment was taken until 9:30 o'clock a.m., Thursday, November 1, 1956. [193])

Thursday, November 1, 1956. 9:30 a.m.

The Court: Are there ex parte matters?

The Clerk: No, your Honor.

The Court: In the case on trial, you may proceed, gentlemen, No. 18715.

Mr. Boshae: I don't know whether Mr. Young wishes to finish his case.

Mr. Young: I understand Dr. Ogden is here, your Honor. I haven't interviewed him. Counsel tells me he is going to put him on the stand, and I didn't want to miss the opportunity of putting him on.

Mr. Boshae: I didn't say anything of the kind.

Mr. Young: When I talked to you on the telephone, you said you were going to subpoena him.

The Court: Now, gentlemen, none of this. If you wish to reopen the plaintiff's case, call the doctor.

Mr. Young: No, your Honor.

The Court: You rest?

Mr. Young: I rest.

The Court: Do you wish to make your motion now, that you have reserved?

Mr. Boshae: Yes, your Honor, I would like to.

If the court please, the defendant makes a motion to dismiss the plaintiff's claim in this matter on the following grounds: [195]

That the evidence, taking all reasonable inference is in favor of the plaintiff, I don't think, your Honor, that the plaintiff has established a case of obtaining a conveyance of this property by undue influence or fraud, or that the grantor was physically incapacitated.

If we analyze the testimony——

The Court: Doesn't the—proceed.

Mr. Boshae: What is that, your Honor?

The Court: You proceed. I will not interrupt you.

Mr. Boshae: May I make this observation, for the purpose of expediting it: If there is any question in your Honor's mind of denying the motion, I will forego the argument.

My thought was this: The only evidence that I could see that would establish any case insofar as the plaintiff is concerned was that Mr. Grenier had told Mr. Edgar that he got the conveyance merely for the purpose of waiting until the outcome of some other litigation between the deceased and his sister-in-law or some other relative had taken place.

And in connection with that, your Honor, I submit that that has nothing to do with the intention of the grantor. It wasn't directed as to what was said, anything that was said by the grantor, and I feel, your Honor, that the plaintiff has not established a case in this matter. [196]

The Court: Doesn't the evidence establish the existence of a fiduciary relationship between the decedent and the defendant?

Mr. Boshae: Yes, I will concede that, your Honor.

The Court: Then wouldn't that shift the burden to the defendant?

Mr. Boshae: Yes, it would, your Honor, excepting I think that it has been overcome by a failure to produce any wrongful acts on the part of the grantee. I don't think there is anything in the record to show there was any wrong dealing, or dealing beyond arm's length, or where there was no disclosure, where there was a failure of disclosure

by Mr. Grenier to Mr. Harley that he had done anything wrong.

In fact, I think the plaintiff's evidence shows—I am sure it does—when Mr. Edgar and Mr. Harley stated on June 18th they were told, both of them were told, that the deed was given by Mr. Harley to Mr. Grenier. They knew about it, and it was supposedly to someone who purported to be an heir-at-law or to have been a legal counselor of the deceased, and nothing was done about it. The deed shows on its face that it was recorded shortly after it was given, I think it was on the 18th of May, and there was no concealment. Everything was open and above board, and they took no action to do anything about it until after the deceased had had his mouth sealed by death, and then they come in now to set it aside. [197]

I submit, your Honor, even upon the plaintiff's own testimony in evidence that the burden has been overcome,—by the testimony of Mr. Edgar and Mr. Harley.

The Court: Isn't the burden on the defendant to show that it was a gift? Since admittedly no consideration was paid, isn't the burden on the defendant to show it was a gift?

Mr. Boshae: Yes, I agree to that proposition, your Honor.

The Court: No gift tax has been paid, and, apparently, no gift tax return was made. When was the gift tax return due, under the law?

Mr. Boshae: I think it is 18 months after the gift, your Honor, and so far as the gift tax is con-

cerned, that has no bearing on the grant. That is for the Government to determine.

The Court: I am not suggesting that this is the proper place to collect a gift tax, but presumably donees obey the tax laws. If this were a gift, the tax would be paid.

Mr. Boshae: That is correct, but there is no issue here being raised that the gift tax is due at the present time.

The Court: I am asking you what the state of the law is on it.

Mr. Boshae: As far as I understand, from what I have [198] been informed of it, your Honor,—I am not too familiar with the gift tax law—but I understand that Mr. Grenier consulted the Internal Revenue Department, and they told Mr. Grenier that it wasn't necessary to pay it at this time for two reasons: One, it would be premature for him to pay it, and, No. 2, the donor was required to pay it.

The Court: Both the donor and the donee are required.

Mr. Boshae: Yes. That is what I was informed by Mr. Grenier that the Internal Revenue Department informed him. Of course, that has nothing to do with the plaintiff's case here.

The Court: The motion will be denied.

Mr. Boshae: Thank you.

The Court: Your next witness for the defense.

Mr. Boshae: Yes, your Honor. Dr. Ogden, please.

DR. WALTER R. OGDEN

called as a witness on behalf of the defendant, having been first duly sworn, was examined and testified as follows:

The Clerk: Will you state your name, please?

The Witness: Walter R. Ogden, M.D.

Direct Examination

Q. (By Mr. Boshae): Dr. Ogden, what is your business or profession?

A. I am a doctor of medicine. [199]

Q. Are you licensed in the State of California—

A. Yes.

Q. —to practice medicine? How long have you been so licensed, doctor?

A. Since 1942.

Q. Have you specialized in any particular field?

A. No, I am a general practitioner.

Q. Now, Dr. Ogden, do you know, or did you know an individual by the name of Daniel L. Harley?

A. Yes.

Q. When did you first see him, Doctor?

A. I think I met Dan in 1948 or '49.

Q. And what was the occasion of your getting acquainted with him?

A. He had been treated by my partner at that time, Dr. Simons, and in Dr. Simons' absence once I saw Mr. Harley when he was ill, and subsequently we operated on his stomach, and I treated him from then on over a period of five or six years until he died.

Q. And how often did you have occasion to see him, Dr. Ogden?

(Testimony of Dr. Walter R. Ogden.)

A. Well, during those early years, the early '50s, oh, perhaps every couple of weeks or months. Sometimes daily when he would have severe illnesses. During his last year, much more frequently. After his wife died in the early spring,— [200]

Q. Of what year, please?

A. Of last year, 1955, then I saw him almost constantly. Daily for a long time, and several times a week always.

Q. And when you would see him, Doctor, say, before May 16th, 1955, what did you observe was his condition,—I mean his physical appearance and his mental condition?

A. His physical condition was a severe illness. On occasions he had emphysema of his lungs, and he didn't have much breath. In other words, he couldn't walk or maneuver very far without getting out of breath. He had some heart failure on occasions. He had bouts of pneumonia. He had several serious illnesses during the spring of 1955, but mentally Dan was real clear and real competent until he had his last illness, which was a stroke that occurred just about 24 to 36 hours before he died.

Q. Now, did you have occasion to see him up to that time? A. Yes.

Q. And what was his condition on or about—if you recall, on or about May 16, 1955?

A. Well, on or about May, or during May and that period, he was confined to the home primarily. He rarely came to my office. I think he made his last visit to my office in late April. From then on

(Testimony of Dr. Walter R. Ogden.)

I called on him at home only, although he did go out. Joe would ask me could he take [201] him for a haircut, and this and for that, and to the bank to do business, and various things, so he did go out of the home, but he didn't drive himself after—I don't think he drove after his wife died. He may have, however, a time or two.

Q. Now, Doctor, could you tell us whether or not he could walk?

A. Yes, he could walk up until he had his last illness, the date before he died.

Q. He could walk up until that time?

A. Yes.

Q. Did you know his condition with reference to his eyesight?

A. Yes. I think, and I feel sure that Dan could see, and quite well, up until he had his last illness.

Q. And when was that illness?

A. Well, the last illness is the 24 to 36 hours before he died.

I returned from a week's trip in his old home state, Montana, and Yellowstone National Park, just two days before that, and when I came back and hadn't seen him in about a week, he was sitting at the couch near the window, and he turned and recognized me, and spoke to me through the window. I walked to the window before I came around to the door.

Yes, Dan could see up until the day he died. [202]

Q. Now, Doctor, do you have an opinion as to his mental condition, mental sanity or insanity?

(Testimony of Dr. Walter R. Ogden.)

A. Well, Dan was sane. He was mentally competent and sane. I came to such a court here last year about that.

Q. You mean in the guardianship matter?

A. Yes, while he was still alive.

Q. The instance we are speaking of is subsequent to that guardianship matter, and that is what we are interested in at the present time. Would you say he was sane or insane mentally?

A. He was sane.

Q. Now, in your opinion, Doctor, was he rational or irrational?

A. He was always rational until he had his last illness, that 24 to 36 hours.

Q. Now, doctor, would you say, in your opinion, that he was a normal individual, who could transact normal business? A. Yes.

Q. As far as mental capacity is concerned?

A. Yes.

Q. Now, Doctor, did he ever discuss any of his business affairs with you?

A. Yes, quite a few of them; business affairs, personal affairs, and everything.

Q. Did he ever discuss any property matters with you? [203] A. Yes.

Q. Did he ever discuss any property matters in connection with Mr. Grenier? A. Yes.

Q. Would you tell us what he said, if you can recall, please? Did he ever discuss any Montana property? A. Yes.

Q. All right. Would you kindly tell us what he said, if anything.

(Testimony of Dr. Walter R. Ogden.)

The Court: Why don't you lay the foundation now, as to time, place, and persons present?

Mr. Boshae: I am sorry, your Honor. Thank you.

Q. Could you tell us, Doctor, the approximate time you had the first conversation with Mr. Harley in connection with any statements or conversations you had with respect to his property in Montana?

A. Yes. In the spring after his wife had died, Dan told me that——

Mr. Young: I object, your Honor. There is no foundation as to persons present or where it occurred.

Q. (By Mr. Boshae): All right. Was there anybody present besides you and Mr. Dan Harley?

A. On a number of occasions he talked about this thing with me alone, and with Mr. Grenier. I am not sure where it was discussed in front of his nurse, but I think it was. [204]

Q. All right.

A. So, at least, those people, but it happened something like this,——

Mr. Young: I object to the conversation, your Honor, on the ground it is hearsay.

The Court: Overruled.

Q. (By Mr. Boshae): Go ahead, Doctor.

A. After his wife had died,—Dan had been seriously ill with pneumonia just prior to his wife's death, and I had had him in the hospital, and he got over that, and was at home when she passed away. I went to see him within a few hours after she

(Testimony of Dr. Walter R. Ogden.)

had died, and it was subsequent to that that he introduced me to Joe Grenier.

He told me Joe had been a lifelong friend, that they had been in business together, and a bit about the background of he and Joe together. When I asked him who Joe was, then he introduced me to him.

I think that is the first time he ever told me anything about the Montana property, except that over the years he had told me that he did have property in Montana.

Q. What did he tell you, if anything, about the Montana property at that time?

A. At that time Dan told me that he had inherited through the death of his sister the mother's estate, something in the East, and he knew now that he had plenty of [205] money. That's the way he used to put it.

He said, "I used to wonder if I would have enough to live out my life, and live in the fashion that I was accustomed to," and so on, but he said, "I know now I have enough," and he told me a bit about that.

He told me that he was going to deed to his nephew, Jimmy Harley, certain property that had come through this estate of the mother, and then his sister, and at that time is the first I remember of him telling me that he was going to deed to Grenier certain property in Montana. He told me it was an old bowling alley, and I think something—an old building the bank used to occupy at one

(Testimony of Dr. Walter R. Ogden.)

time, and a tavern or old building in Montana, some buildings in Montana.

Q. Was that the substance of that conversation at that time?

A. Yes. That was the first I recall hearing anything about Joe and him and property.

Q. Now, Doctor, could you tell us if you had any other conversation in connection with the Montana property?

A. Yes, I had a number of conversations with him, because Dan used to like to have me sit there and talk. He wanted me to spend time with him, which I did on occasions, and——

Q. Could you give us the approximate time when the other conversation, the next conversation took place, if you can recall? [206]

A. Well, I remember that it was discussed by he—by Dan and Joe Grenier a will that was being formulated. This is about in April, and one day I received a telephone call from an attorney, Joe Edgar, or a Mr. Thompson, one of the two of them called me and asked me about Dan, and so forth, and was he mentally competent, and so on. So they had me meet at Dan's home this day in April to——

The Court: To witness?

The Witness: ——to witness a will. Now, during the few days prior to that Dan had the nurse call me to come over, and he read to me considerable of that will that I was going to witness.

Q. (By Mr. Boshae): Dan read to you?

(Testimony of Dr. Walter R. Ogden.)

A. Dan read to me, and he read about willing to Joe Grenier a half interest in this property in Montana.

I witnessed that will some time after that, I think the next few weeks after that, and, oh, on several occasions Dan had told me that his nephew Jimmy wanted to move him, wanted him to close up his house, sell it, move to Long Beach, live with him. He didn't want that. Dan wanted to stay there. Dan wanted to live there as long as he lived. He used to tell me he didn't think he would live very many months, and he wanted to live it out here.

He said, "I want you to take care of me, I want to be [207] with my friends, Joe stays with me as much as he can," and so on, and so forth.

So soon after this will was witnessed by me, then Dan told me he had decided to deed the property in Montana over to Joe Grenier before he died.

Then some weeks later, just how long I am not sure now, but some weeks later he told me he had deeded it to Joe Grenier.

So that's what I know about the property in Montana.

Q. And was there anybody present when he told you this?

A. Joe Grenier was there on several occasions, because Joe told me, described the property to me a little bit, and the two of them used to talk about the property together, and how—Dan used to explain how drunk he used to get in a tavern that was near this property, or within a part of the

(Testimony of Dr. Walter R. Ogden.)

property, and he used to like to go back over his escapades in youth with Dan—or, with Joe in my presence.

Q. Now, did he ever tell you, Doctor, that he was incompetent and wanted a guardian appointed?

A. No.

Q. Did you ever see Jim Harley there?

A. Yes, I have seen Jim at the home. I don't know how many times, but I think I have seen his wife and child there more than him. They stayed there when he was at work, I guess. [208]

Q. Was there any discussion between you and Mr. Jim Harley with reference to the appointment of a guardian of any kind for Mr. Dan Harley?

A. No. No, when they wanted to appoint the guardian, Dan was real upset. In fact, he asked me, "Do you think I am crazy?"

"Certainly not, Dan."

Mr. Boshae: You may cross examine.

Cross Examination

Q. (By Mr. Young): When did Mr. Harley suffer pneumonia, or have pneumonia?

A. The attack that I speak of was prior to the death of his wife, some weeks prior to that.

Q. Did you send him to the hospital?

A. When he was in St. Joseph's Hospital.

Q. It was a severe case of pneumonia?

A. Yes.

Q. And he was hospitalized by you?

A. Yes.

(Testimony of Dr. Walter R. Ogden.)

Q. Did he suffer a stroke? A. Yes.

Q. He suffered a stroke a couple of days after [209] his wife died, didn't he?

A. No. He had his stroke just the day before he died, clear up in late July.

Q. Didn't he have a stroke before that,——

A. No.

Q. ——two days after his wife died?

A. No.

Q. Did you employ Mrs. Studebaker, his nurse, or refer her to him?

A. Yes. I didn't exactly employ her. He employed her, and then I gave her directions. She was the nurse for his wife, and she just stayed on after the wife died.

Q. Did Mrs. Studebaker keep a chart of the time she was with your patient?

A. Yes, she used to keep certain records.

Q. Well, did she furnish you with any notes?

A. Yes, I am sure I used to look at her notes and the records on the visits.

Q. Do you know where those records are now?

A. No, I don't.

Q. Do you have them in your possession?

A. No, I don't.

Q. Didn't Mrs. Studebaker tell you that on the 22nd day of March Dan had a slight stroke?

A. She may have. I don't recall. She used to [210] get real excited and upset about the various little things that would happen to Dan.

(Testimony of Dr. Walter R. Ogden.)

Q. She could have told you that he had a slight stroke?

A. She could have said that, yes.

Q. What was the diagnosis that you made of his case, involving all of the things that he suffered from?

A. You mean after he died?

Q. Well, I don't believe so. I think during the time he was alive, after his wife died.

A. When? Oh, after his wife died?

Q. I will ask you specifically. He had heart trouble, didn't he?

A. Yes.

Q. And he had a severe heart case, didn't he?

A. He had heart failure, yes.

Q. Describe to us the condition of his heart.

A. He had heart failure, I felt, on the basis of hardening of the arteries.

Q. And he had a very severe case of arteriosclerosis, which is hardening of the arteries; isn't that right?

A. Yes.

Q. He couldn't get circulation down to his feet, could he?

A. Oh, yes. He had no foot trouble.

Q. Were his ankles swollen from the time his [211] wife died up until he passed away?

A. Yes. That is one of the things I was treating him for constantly.

Q. And what treatment did you give him in that connection?

A. Well, various medications for such.

Q. Did you give him sedatives?

(Testimony of Dr. Walter R. Ogden.)

A. Yes, I am sure Dan had some phenobarbital, some sedatives.

Q. Every day after his wife died until he passed away?

A. I don't know that he had it every day, but I think he had taken some sedatives for years.

Q. Didn't he have a serious involvement of his respiratory system, also? A. Yes.

Q. What did that amount to, what did it consist of, the respiratory trouble?

A. He had emphysema, that is, his lungs did not function properly on exercise. They couldn't take in and put out enough oxygen into his blood with exercise. So he led a rather sedentary life for the past several years.

Q. Did you prescribe oxygen for him after his wife died? A. Yes.

Q. Did he take that daily? [212]

A. I don't know that he took it daily. He had taken it a lot before she died, and after.

Q. It is a fact that after his wife passed away, he was practically bedridden all the time, isn't it?

A. No.

Q. Isn't it a fact, Doctor, that after his wife passed away he was on his deathbed up until the time he died on the 30th of July?

A. Oh, no. Dan,—I am not sure that he drove his car afterward, because I think Jimmy took his car away, and said he shouldn't drive. At least, I told him he shouldn't, but he came to my office a number of times after she died, and I made calls

(Testimony of Dr. Walter R. Ogden.)

to see him at home, when he wasn't even there, long after she died. He would be downtown.

Q. With Joe Grenier?

A. With Joe, or with someone else.

Q. Did you discuss this case with Joe Grenier before coming to court? A. Discuss it?

Q. Yes. A. No.

Q. Have you seen Joe Grenier at any time except this morning in the last three months?

A. Yes.

Q. When? [213]

A. Three months? I saw Joe last week. Joe came to my office last week. I don't know what day now, but it has been perhaps a week ago.

Q. On that occasion did you discuss your testimony with him? A. Well, discuss, no.

Q. You didn't talk to him about what you were going to testify?

A. Yes, I did talk to him. Joe told me that it looked like I was going to have to go to court, that people were trying to say that Dan was incompetent, and couldn't see, and asked me if that was true, could he see.

I said, "Yes."

He said, "Well, I took him to an optometrist to get some glasses for him, and now that man says he couldn't see."

And this was back in the spring. I have forgotten when he told me.

I said, "Well, that is for sure not true," and I said, "I will be happy to back you up in such."

(Testimony of Dr. Walter R. Ogden.)

Q. Did you discuss these conversations that you have testified about, where you said you were present, and Mr. Harley and Mr. Grenier, and Mr. Harley talked about this Montana property?

A. No, Joe didn't ask me about the property per se.

Q. He didn't say anything to you about that?

A. No.

Q. By the way, when did the first conversation take place that you heard, with reference to property being conveyed to Mr. Grenier?

A. By "conveyed," you mean being deeded to Mr. Grenier?

Q. Deeded, yes.

A. I think soon after his wife died Dan told me he had done it. He told me he was going to before that.

Q. When was it deeded?

A. Well, I don't know exactly when it was deeded, but I gather from this conversation that you are talking about, May, the 1st of May.

Q. Is that what Mr. Grenier told you?

A. The 1st of May, or something.

Q. When did you talk to Mr. Harley? Fix a date, as well as you can, when you talked to him about any deed to Mr. Grenier.

A. Well, near the time of the will which I witnessed, which was in April sometime.

Q. Was it before or after the will was written?

A. Before, because Dan read to me from the will that he was going to deed him half of the

(Testimony of Dr. Walter R. Ogden.)

property, or give him half of the property. Then after that he told me he was going to deed it all to him.

Q. How long after you had this conversation [215] about the will, did he tell you he was going to deed it all to him?

A. I don't know. I think within the next month, within the near future after that.

Q. Do you recall the date you witnessed the will? A. No, I don't.

Q. Then you would fix the time that you had the conversation about the deed with Mr. Harley, the deed from Mr. Harley to Mr. Grenier, as around the 1st of May?

A. That he had deeded it to him?

Q. Yes.

A. I don't know exactly what date it would be.

Q. Well, can you give us an approximate date?

A. As close as I could come would be the next month after I witnessed the will, the next month or even two. I am not sure. We had conversations before he deeded the property to Joe, and then again after he had, and he also told me of deeding certain property to his nephew Jimmy.

Q. When was the second occasion that he told you that he had deeded the property to Mr. Grenier, the Montana property?

A. Well, as I spoke before, the first occasion when he told me he had deeded it was, I assume, soon after it was done, because I recall coming there and he wasn't there, and I think when they

(Testimony of Dr. Walter R. Ogden.)

returned in a few minutes, while I was still there speaking with the nurse, he and Joe told me they [216] had been to the bank.

Now, whether that was because of that, or because of some money he had been drawing out and giving Joe from the bank, I don't know, but they talked about this. I am not sure. But then the second occasion, I don't know when it would be, but I know that even when I returned from Montana and from Yellowstone National Park in July, just a few days prior to his death, he told me that Joe now owned the property up in Montana, because he talking about going back to Montana.

Q. What date was that?

A. I think either just a few days or within a week before he died.

Q. Did you go to his house to see him?

A. Yes.

Q. On that occasion did he tell you he was going to marry his nurse?

A. They discussed such.

Q. In your presence?

A. Kidded about such, yes, in my presence. She wanted to marry him and take him to Honolulu. They were talking about going to Hawaii.

He said, "Well, I will never get well enough." He said, "If you can get me well enough to go to Montana, though, I would like that." [217]

Q. Did he tell you that he was going to marry Mrs. Studebaker?

A. I don't know that he ever told me that he

(Testimony of Dr. Walter R. Ogden.)

was actually going to marry her, but I remember that they kidded about it, and discussed the matter.

Q. Well, as a doctor, would you consider that a man of his age,—77 years, wasn't he?

A. Yes.

Q. —and with the physical condition that he was in, that if he would discuss marriage with his nurse that that would indicate to your mind he was in full possession of his faculties?

A. Well, he was a great kidder, and so was she, you know.

Q. You think he was kidding, then?

A. I would think so. I don't think he ever intended to get married.

Q. Didn't he tell you that he was either going to marry his nurse or was going to leave her his property in Glendale where he was living?

A. Well, he talked about leaving her property, yes, but I don't think he ever put it that way, that he was either going to do one or the other.

Q. Do you consider that a normal condition for a man in his physical state, as you have described [218] it, at his age, to be deeding property to his nurse?

A. He didn't ever deed any property to her.

Q. Or to talk about it?

A. Yes, I consider it quite normal. Many older people that get attention from younger women talk about deeding things to them.

Q. You refer to Mrs. Studebaker as a younger woman?

A. Younger than Dan.

(Testimony of Dr. Walter R. Ogden.)

Q. She was in her sixties, wasn't she?

A. I think near that, near sixty.

Q. A white-haired old lady?

A. But he was seventy-five.

Q. What is that?

A. But he was seventy-five.

Q. Do you consider a man—strike that.

What was his physical condition, with reference to his energy or his ability to act in a normal way after his wife died?

A. He didn't have very much energy. Short walks would tire him. He would walk around the house and be tired.

Q. How much did he weigh when you had him in the hospital with pneumonia?

A. I don't recall. He was thin for years and years, real thin.

Q. How much did he weigh, though, when you had him in the hospital? [219]

A. I don't know.

Q. How much did he weigh when he died?

A. I don't know.

Q. He didn't weigh over 80 pounds, did he?

A. I think Dan weighed more than 80. I don't think he ever got that down.

Q. Did you ever weigh him? A. Oh, yes.

Q. When was the last time you weighed him?

A. I don't know now.

Q. What did he weigh?

A. I don't know, but I would fix his weight at near 90 to 95, his low weight, in the 90s.

(Testimony of Dr. Walter R. Ogden.)

Q. Well, do you consider that a normal condition for a man his age, to weigh only 90-95 pounds?

A. Well, not normal, no, certainly not. Not ideal, anyway.

Q. Did he talk to you about dying after his wife passed away? A. Yes.

Q. He told you he knew he was going to die, didn't he? A. Yes.

Q. You knew it, too?

A. I didn't think he would live too long, no.

Q. You didn't think he would live three months after his wife died, did you?

A. Even before that, I didn't think so.

Q. So you weren't surprised when he died on the 30th of July, of 1955? A. No.

Q. Now, Doctor, is Dr. Owens associated with you?

A. No, Dr. Owens has an office across the street from me. At the time that Dan, when he was treating Dan, though, he was in the same building I am in. He treated Dan in my absence, when I was in Yellowstone, and also saw him with me in consultation prior to my going to Yellowstone, and after I returned also.

Q. How long were you away when you went to Yellowstone?

A. I think about eight to ten days.

Mr. Young: May I approach the clerk's desk, your Honor?

The Court: You may.

Q. (By Mr. Young): Did you submit a state-

(Testimony of Dr. Walter R. Ogden.)

ment for your services prior to Mr. Harley's demise?

A. I guess, yes, many of them over the years.

Q. When was the last time you were paid for your services?

A. I don't recall now. I know I received some money from Dan or Joe during the time I treated him in the spring, or in the summer, too, before he died. [221]

Q. Well, you were paid up through the month of June, weren't you?

A. I don't think so. I don't think I have ever been paid up from him for years.

Q. What do you mean?

A. Well, he continually owed me money over the years, let's put it.

Q. Didn't you submit regular bills?

A. Yes.

Q. How much did you charge for a house visit?

A. Varying amounts, depending on what I did, and when it was.

Q. Were you there every day?

A. Sometimes I would see him more than once a day.

Q. I show you a check dated May 13, 1955, payable to you, signed by J. H. Grenier, for \$90.

A. Yes.

Q. Did that pay you up to the date of that check?

A. I don't know. That might have been for laboratory work done then, or for medication. I fur-

(Testimony of Dr. Walter R. Ogden.)

nished him with medicine, and laboratory work, and so on, too.

Q. Did you furnish him with itemized statements?

A. I don't think so. I don't think he asked for any itemized statements.

Q. I show you a statement dated August 2, 1955, to [222] Dan L. Harley, in the sum of \$1,400. Did you send that statement? A. Yes.

Q. What services did that cover?

A. This was a bill sent to him—sent to him, or sent to his estate right after he died.

Q. On August 2?

A. For all my services up to and including his last illness.

Q. What were your services during his last illness?

Mr. Young: First, we offer the statement in evidence, your Honor, as the plaintiff's next exhibit.

Mr. Boshae: I don't see the materiality. I object on the ground of its being incompetent, irrelevant and immaterial.

The Court: Overruled. Received in evidence.

The Clerk: Plaintiff's Exhibit 15.

(The document referred to was marked Plaintiff's Exhibit 15 and was received in evidence.)

Q. (By Mr. Young): Can you tell me the services you rendered for that bill for \$1,400?

A. Well, here is a man that I treated for at

(Testimony of Dr. Walter R. Ogden.)

least eight years, saw not hundreds of times, but thousands of times.

Q. He was pretty sick, then, wasn't he? [223]

A. Yes, on many occasions.

Q. Do you mean to state he didn't keep you paid up currently? A. That's right.

Q. Where are your books, your records?

A. At my office.

Q. Has Joe Grenier paid you any money since Mr. Harley died?

A. No. I have been trying to get Jim Harley to pay it. I have written several—filled out papers, and so on, and so forth, and was told I was going to be paid by the Veterans Administration, and so on. I filled out papers for them.

Q. Has Mr. Grenier paid you any money since Mr. Harley died for anything?

A. No, I am sure he hasn't. He may have sent a check about that time, but I am not—

Q. He hasn't paid you anything on account of this statement for \$1,400? A. No.

Q. You didn't file a claim in the estate of Dan L. Harley for that bill, did you? A. Yes.

Q. You filed a claim?

A. Well, we did what Jimmy told us to do. He wrote a letter, and told me to fill out some papers, and I had my [224] secretary fill them out.

Q. That is in connection with the Veterans Administration, isn't it?

A. That is who he told me was going to pay it, or something.

(Testimony of Dr. Walter R. Ogden.)

Q. You didn't file a claim in the probate proceeding, did you?

A. I don't know they even have it. We sent the bill, but we have never filled out any statements we had to file.

Mr. Young: That is all, your Honor.

The Court: Any redirect?

Mr. Boshae: I don't think so, your Honor.

The Court: You may step down, Doctor.

Is there any occasion to require the further attendance of Dr. Ogden?

Mr. Young: No, your Honor.

Mr. Boshae: I don't think so.

The Court: You are excused, Doctor.

The Witness: Thank you.

(Witness excused.)

The Court: The next witness.

Mr. Boshae: Joe Grenier. I think you have been sworn before, Mr. Grenier. [225]

J. H. GRENIER

the defendant herein, called as a witness in his own behalf, having been previously duly sworn, was examined and testified further as follows:

Direct Examination

Q. (By Mr. Boshae): Mr. Grenier, how long had you known——

The Court: Conduct your examination from the lectern, if you will, Mr. Boshae.

Mr. Boshae: Sir?

The Court: If you will conduct your examina-

(Testimony of J. H. Grenier.)

tion from the lectern, we can hear better. There is a loudspeaker there.

Mr. Boshae: All right, your Honor.

Q. (By Mr. Boshae): Mr. Grenier, how long had you known Mr. Dan Harley prior to his death?

A. Well, that is pretty hard to state. I knew Dan when I first hit Montana, and I would say I got more or less intimately acquainted with him around 1906 or 1907, or somewhere around there. I couldn't state the exact year.

Q. Where did you meet him?

A. In Butte, Montana. We happened to work for different concerns. I followed the electrical business, and so did he. We would work here one week, and two weeks there, at different places, and we become acquainted through those [226] different periods of working together.

Q. And did you come to know him very intimately? A. Yes, very intimately.

Q. Did you ever have any business dealings with each other? A. By that, what do you mean?

Q. Were you ever involved together?

A. Yes, we did business together in different ways.

Q. Did you ever lend him any money?

A. Yes, I did. He loaned me some money, and I have loaned him some money.

Q. How often did you have occasion to see him over this period of years?

A. Well, up to the time he left Montana, I would see him practically every day.

(Testimony of J. H. Grenier.)

Q. You were working for him; is that correct?

A. I worked for him for three years after I come back in 1925. That is, he was my immediate boss, and we were both working for the power company.

Q. Have you continued your correspondence and friendship up until his death?

A. Yes. We lived together, our families did, and we were very intimate.

Q. Now, did you know he came to California in the '40s, sometime in the 1940s? [227]

A. Yes, he came to California the winter of 1947.

Q. And did you ever come to visit him during that time? A. After the time he come here?

Q. Yes.

A. Yes, three and four and five times a year.

Q. And what was his condition when you would see him, his physical condition?

A. Well, up until that time Dan had ulcers, stomach ulcers. That is, he didn't become in the condition he was in until after he was operated on for them, but he had stomach ulcers.

Q. Was he ever a heavy-set man?

A. No, no. Dan was always a thin man.

Q. Now, with relation to the spring of 1955, were you ever called to his home?

A. In the spring of 1955, yes.

Q. When were you called at that time?

A. Well, the first time was in March when his

(Testimony of J. H. Grenier.)

wife died. He called me up on a Sunday morning, and I flew down Sunday afternoon.

Q. And what were the circumstances then? Did he ask you to do anything, or did you have any conversations with him of any kind, then?

A. Well, yes. Yes, we had conversations [228] regarding different things, making arrangements pertaining to the funeral, and things of that sort.

Q. Did you observe his condition at that time?

A. Did I observe his condition?

Q. Yes.

A. Yes, he wasn't a well man by any means.

Q. Did you form an opinion as to his mental sanity at that time?

A. Yes. Dan was very, very sane. He was a brilliant man. Dan had a brilliant mind.

Q. Now, after his wife passed away, what did you do? Did you leave, or did you remain there?

A. No, I stayed a few days. Then I left and went back to Montana.

Q. Did you go back to Montana? A. Yes.

Q. When was the next time that you heard or saw Dan Harley?

A. Well, very shortly after that he called up, and wanted me to come down, and wanted to talk to me regarding different things.

Q. What did you talk about?

A. Oh, mostly his business affairs and things of that sort.

Q. Did he ever talk to you about any wills, or [229] anything like that, or any of his property?

(Testimony of J. H. Grenier.)

A. Well, about the wills,—you are talking about wills. There was a will made about that time, or I mean was signed about that time, the so-called March will. I don't know—all I know about that is hearsay, about that will.

Q. Were you present when the March will was made? A. No.

Q. When did you first find out about it?

A. When they were signing it, when the witnesses were signing it. I was eating my dinner in the kitchen, and they were in the other room.

Q. Now, how long did you remain at that time?

A. That is hard telling. I couldn't specify any time. I was going and coming all the time. I would get out of here and get back in Montana, and he would call me back. I would say that I was back and forth, oh, seven or eight times; maybe more, maybe less.

Q. Between what dates, Mr. Grenier?

A. Well, between March 20th and the last time that I come down here, I mean when he died.

Q. Now, were you here at the time that the April will was made? A. No, I wasn't here.

Q. When was the first time you heard of that will, Mr. Grenier? [230]

A. When I come back.

Q. When? A. After I come back.

Q. When was that?

A. Oh, I don't know. I haven't any idea what date.

Q. Had the will already been made?

(Testimony of J. H. Grenier.)

A. Been made and signed, according to my knowledge.

Q. Did you have a conversation with Mr. Harley in regard to the April will?

A. No, not at that time.

Q. When was the first conversation—when was the first time you had any conversation with him with reference to the April will?

A. Well, he was discussing the will, and he was dissatisfied with it.

Q. Can you tell us when that conversation took place?

A. That took place after the will was written. Of course, dates—I can't state any definite dates, no.

Q. Can you tell if anyone was present at the time that he was discussing it?

A. Oh, yes, several different people. Different people like these people that were here, these friends of his that were here, in their presence, and regarding being dissatisfied with the will. As for dates, or times, or who was there, or outside of the nurse, I couldn't say. [231] Joe Edgar was there a couple of times.

Q. Could you tell us, in substance, as far as you can recall, what was said,—what was said by him, or what was said by you, or by anyone else in your presence?

A. Well, the one remark I can't help but remember, when he said to Joe, "I am going to change the will. My will stinks. I am dissatisfied with it."

Q. Just tell us about that.

(Testimony of J. H. Grenier.)

A. Well, that's all I can say. The nurse was there, I imagine, and myself.

Q. Did Joe Edgar say anything in response to that?

A. Joe said, "Well, if you want to change your will, why not wait until this so-called trial that comes up regarding Miss Benifer, Katie Benifer I think her name is, until after that."

The Court: When he said his will stank, what will was he referring to?

The Witness: That April will, or so-called April will.

Q. (By Mr. Boshae): Now, when was the next time you spoke to him in connection with his property or wills, if you can recall?

A. When was the next time I spoke to him?

Q. Yes, afterwards.

A. Well, that conversation come up quite frequently. I couldn't say, I wouldn't want to make any definite statement. [232]

Q. Now, in connection—by the way, Mr. Grenier, at that time, when you had the conversation in connection with the April will, did you observe his condition then, his mental condition?

A. Yes, sure.

Q. Would you say that he was mentally sane or insane at that time?

A. Dan I considered was mentally sane and mentally efficient up until the time, the last time I saw him, and I think that was the Thursday I left. That was a few days before, three or four

(Testimony of J. H. Grenier.)

days before he died, when I left here to go back to Montana.

The Court: Is that April will in evidence here?

Mr. Young: Your Honor, I have it. I have the photostatic copy. I was going to put it in evidence on cross examination.

Mr. Boshae: I have no objection.

Mr. Young: We will offer it at this time, then, your Honor.

The Court: It will be received, pursuant to the stipulation, as Plaintiff's Exhibit——

The Clerk: 16, your Honor.

(The document referred to was marked Plaintiff's Exhibit 16 and was received in evidence.)

Q. (By Mr. Boshae): Mr. Grenier, when was [233] the first time that you had any discussion in connection with the Montana property, with Mr. Harley, Dan Harley?

A. What was that question again?

Q. When was the first time that you had any discussion with Dan Harley in connection with the Montana property?

A. When was the first time?

Q. When did you first talk to Mr. Harley about the Montana property, his giving you the Montana property?

A. You mean deeding it to me?

Q. Yes.

A. Well, that come up after this will.

(Testimony of J. H. Grenier.)

Q. Could you tell us who was present at that time?

A. No, I couldn't. The nurse was present, possibly, but I couldn't tell you.

Q. Could you tell us what the conversation was, what you said and what he said?

A. Yes, that he was dissatisfied with the will, and Joe Edgar wanted to hold off making a new will until after this trial of Benifer come up, so he was going to deed me the property, so there would be no questions asked, that there would be nothing—well, any questions regarding that particular piece of property, or words to that effect.

Q. Did you ask him for the real property in Montana?

A. No, I never did ask him for anything.

Q. Did you ask him to make a deed to you?

A. No, I didn't. No, he approached me about making a deed.

Q. Now, what did you do after he told you that he wanted to deed the property to you?

A. What did I do?

Q. Yes.

A. Well, I got this—he asked me to get these form deeds, and I went downtown and purchased a deed, a form deed.

Q. Is that the deed that we have in evidence here? A. Well, I imagine it is, yes.

Q. This one here?

The Court: Exhibit 1?

(Testimony of J. H. Grenier.)

Mr. Boshae: Yes, your Honor, I believe that is correct.

The Witness: Yes, that's it.

Q. (By Mr. Boshae): Now, Mr. Grenier, since your testimony of yesterday regarding the circumstances of your obtaining that deed, and leaving it with Mr. Harley, do you want to change your testimony in any way, or did you refresh your recollection in any way in connection with the dates?

A. Well, I went and purchased this so-called form, and I left it there, and I went back to Montana.

Q. Now, do you recall now whether or not that deed was filled in, or it was not filled in at that time?

A. I don't think so. I think the deed was filled after I come back. I don't recall that exact——

Q. Then you were incorrect yesterday when you stated that?

A. Yes, I was incorrect, because I don't actually recall whether I had that deed filled out, according to his instructions, that day or prior, but the form itself was around the house for about a week. I left and went up to Montana, and come back again.

Q. In other words, he did not deliver the deed to you until after you purchased the deed, then went back to Montana, and returned about a week later; is that correct?

A. That is when he had the description of the property.

(Testimony of J. H. Grenier.)

Q. Now, when did you buy the stamps on that deed, Mr. Grenier?

A. In Montana, the day it was filed.

The Court: Is the deed of July 28, 1955 in evidence?

Mr. Boshae: The deed of July 28th?

The Court: The will. I am sorry.

Mr. Young: That is the will, your Honor, that was contested.

The Court: Yes, I understand. Is it in evidence here?

Mr. Boshae: I haven't introduced it, your Honor.

Mr. Young: Yes, I thought it was introduced.

Mr. Boshae: I think, Mr. Young, that you introduced the order on the will. I don't know that you introduced the will. [236]

The Court: Exhibit 7 is the findings of fact and order denying petition to probate, and so forth, with respect to the will——

Mr. Boshae: I don't think so.

The Court: ——of July 28, 1955.

Mr. Boshae: I have no objection to its going in, your Honor.

The Court: Do you have a copy of it?

Mr. Young: I have a copy, with the copy of the petition to probate it enclosed within it. There are some pencil marks on it, and, of course, your Honor would ignore those anyhow.

Mr. Boshae: Do you want to remove that petition, Mr. Young? I don't think that is particularly important.

(Testimony of J. H. Grenier.)

The Court: Received in evidence as Defendant's Exhibit next in order. That is the will of July 28, the alleged will of July 28, 1955. Exhibit—what is it, Mr. Clerk?

The Clerk: H, apparently, your Honor. G is the last one I have. I think that was the last one. This will be H.

(The document referred to was marked Defendant's Exhibit H and was received in evidence.)

Q. (By Mr. Boshae): Mr. Grenier, did you ever make any statements to either Mr. Joe Edgar or Mr. Jim Harley, that you were going to take that property, the deed to that property, so that it wouldn't become involved in any litigation between Mr. Dan Harley and his sister or sister-in-law's estate? A. No.

Q. Did you tell them, or either of them, that you were going to take it for any other reason than that it was a gift to you?

A. No, there was no conversation ever brought up regarding this deed, outside of Dan telling them that he had deeded the property to me.

Q. Did you ever tell Mr. Dan Harley that you were going to take it in trust, or on condition that you were going to return it to him, or to the estate, or to anyone else? A. No.

Q. Now, Mr. Grenier, you know of the will contest in connection with the will of July 28th, do you not? A. Do I know of the contest?

Q. Yes. A. I know it was contested, yes.

(Testimony of J. H. Grenier.)

Q. And you filed the will for probate, is that correct? A. Did I file it for probate?

Q. It was filed for probate, that particular will?

A. I don't remember, but Mr. Wunderlich, or what is the name of the lawyer?

Q. Well, it was filed in your behalf, or by [238] Mr. Whitworth; is that correct?

A. Yes. I was mentioned as co-executor, or something. I didn't think I could act because I was a resident of the State of Montana.

Q. Is there any reason why you didn't show up on the contest?

A. Yes, because the money involved, so mentioned yesterday, I already had that in my name. I paid the inheritance tax on it, and transferred the account from the joint account to my account, and as per your instructions, I wasn't involved, I had nothing involved in there.

Q. You were advised by me not to appear; is that correct? A. That's right.

Mr. Boshae: I would like to offer this tax receipt in evidence.

Mr. Young: I object to it on the ground it is wholly immaterial and self-serving.

The Court: The tax receipt on what?

Mr. Boshae: On the money. That was introduced, and I think counsel brought that up, brought up these bank accounts, your Honor.

The Court: Very well. Overruled. Received in evidence as Defendant's Exhibit I.

The Clerk: Is this a part of Exhibit I? [239]

(Testimony of J. H. Grenier.)

Mr. Boshae: Yes, that is a part of it.

(The document referred to was marked Defendant's Exhibit I and was received in evidence.)

Q. (By Mr. Boshae): Did Mr. Harley ever tell you why he was giving you that deed, Mr. Grenier?

A. Because he was dissatisfied with the will, and he was going to see that I got this property. In fact, I loaned him a part of the money when he bought this property in 1936.

Mr. Boshae: You may cross examine.

Oh, may I ask one more question, Mr. Young?

Mr. Young: Yes.

Q. (By Mr. Boshae): Mr. Grenier, did you pay any gift tax on this property in Montana?

A. No, I didn't. I was told I had 18 months before the gift tax had to be paid, and, also, the Internal Revenue Collector in Helena, Montana, told me, being it was a gift, that the estate was subject to paying the gift tax.

Mr. Young: I move to strike that, your Honor, as hearsay.

The Court: The part "I was told" is stricken.

Mr. Boshae: You may cross examine.

Cross Examination

Q. (By Mr. Young): Now, Mr. Grenier, Mrs. Catherine Benifer was a sister [240] of Mrs. Tessie Harley; is that right? A. Yes.

Q. And Mrs. Tessie Harley was the wife of Dan L. Harley? A. Yes.

(Testimony of J. H. Grenier.)

Q. Is that correct? A. Yes.

Q. And Mrs. Agnes Kelley was also a sister?

A. Yes.

Q. Is that right? A. Yes.

Q. Now, when Mr. Harley told you that he was dissatisfied with his will, he referred to the will where he left some of his estate to Mrs. Benifer and Mrs. Kelley, didn't he?

A. No, that will—the will he was referring to was the will that was drawn up, so-called will he called it, Mr. Thompson's will. That was——

The Court: That was the April will?

The Witness: That was the April will.

The Court: Exhibit 16 here.

Mr. Young: April 7th.

Q. But isn't it a fact that Mr. Harley told you that he was going to change his will of March 22nd which mentioned Mrs. Benifer and Mrs. Kelley?

A. Yes.

Q. Going to change it because Mrs. Benifer had filed a contest on his wife's will?

A. That's right.

Q. And also Mrs. Benifer had filed a petition to have Dan Harley adjudged or adjudicated incompetent? A. Right.

Q. And that was the reason he was going to change the will?

A. That was that March will, yes.

Q. So he did change that and made a will on April 7th, didn't he?

(Testimony of J. H. Grenier.)

A. Yes. I stated the April will, but the date, I don't know anything about that.

Q. But the reason he wanted to change his March will was to cut out Mrs. Benifer and Mrs. Kelley as his beneficiaries?

A. As for Mrs. Kelley, I don't know anything about Mrs. Kelley being mentioned in that so-called March will, but I know Mrs. Benifer was.

Q. And that is where he said that that will stank,—that is what he referred to, as to Mrs. Benifer; isn't that right?

A. No, sir, it is not right.

Q. What part of the will of March 22nd did he tell you stunk or stank? [242]

The Court: Not the March 22nd.

Mr. Young: March 22nd, 1955.

The Witness: Not the March 22nd. The April is what I am talking about.

Mr. Young: April 7th. There is a will dated March 22nd, your Honor.

The Court: Yes, March 22nd, but the one he said stank is the April will, as I understand it, the will of April 7th.

The Witness: Yes, April 7th.

Q. (By Mr. Young): In what respect?

A. I don't know, because I don't know nothing about the will, I don't know what was in the will.

The Court: The March will is Plaintiff's Exhibit 3, and the April will is Plaintiff's Exhibit 16.

Q. (By Mr. Young): I call your attention to

(Testimony of J. H. Grenier.)

Plaintiff's Exhibit No. 16, which is a photostatic copy of the will dated April 7th.

The Court: May I say that Exhibit I, Mr. Clerk, is the last one introduced.

Q. (By Mr. Young): (Continuing) Calling your attention to the first paragraph that makes any disposition of his property:

"Fourth: I hereby give, devise and bequeath to the following persons the following sums of money [243] or other property:

"(1) To my sister-in-law, Edna T. Harley, of San Marino, California, the sum of Five Hundred Dollars."

Did you know his sister-in-law?

A. Yes, I did.

Q. Did he tell you that that was one of the provisions in the April 7th will that stank?

A. No, he didn't tell me anything about it at all. He just stated the will itself stank.

Mr. Boshae: Will you please speak a little louder, Mr. Grenier, so that I can hear you.

Q. (By Mr. Young): "(2) To my deceased wife's sister, Agnes Kelley, also known as Mrs. Pat Kelley, of Butte, Montana, the sum of Five Hundred Dollars."

Did he tell you about that provision?

A. No, he did not.

Q. Did he say that stank?

A. He didn't mention any provision in the will. He said the will stank as a whole. That was the conversation.

(Testimony of J. H. Grenier.)

Q. You know these two people?

A. Yes, I do, I know them very well.

Q. And they were relatives of his?

A. Mrs.—this Mrs. Harley is Jimmy's step-mother.

Q. Yes. [244]

A. And this (indicating) is his wife's sister.

Q. Jim Harley or Dan?

A. Mrs. Dan Harley's sister is the woman from Butte.

Q. Mrs. Kelley? A. Yes.

Q. And this woman here, Mrs. Doris Cornforth, mentioned in paragraph (3), who is she?

A. I have to think about that. I think she is a niece of Mrs. Harley.

Q. Of his wife?

A. Yes, but I am not sure about that. I don't know.

Q. "(5) To my old and esteemed friend, Joseph H. Grenier, of Deer Lodge, Montana, an undivided one-half interest in and to the three buildings and real estate owned by me and located in Deer Lodge, Montana."

That is you? A. Yes, sir.

Q. He didn't say that stank?

A. He mentioned—he mentioned that the whole will stank.

Q. "Fifth: I hereby give, devise and bequeath all of the rest, residue and remainder of my property and estate of whatsoever kind and character and wheresoever same may be situated, in which I

(Testimony of J. H. Grenier.)

may have any interest, [245] of which I may die seized or possessed, to my nephew, James W. Harley, Jr., of Long Beach, California.”

You knew Jim?

A. Sure, I have known him since he was a kid.

Q. Are any of those names that I read to you in that will that are not either relatives of Dan Harley or his wife, except yourself?

A. Well, the Mrs. Harley—Jimmy’s stepmother, it was his brother’s wife, Dan’s brother’s wife.

Mr. Young: That is all, your Honor.

Mr. Boshae: You may step down, Mr. Grenier.
(Witness excused.)

Mr. Boshae: The defendant rests, your Honor.

The Court: Any rebuttal?

Mr. Young: No rebuttal.

The Court: Both sides rest?

Mr. Young: We rest.

The Court: I think we will take the morning recess, and then I will hear your argument.

(A short recess.)

The Court: You may proceed.

Mr. Young: May it please the court. It would be supererogation on my part to undertake to discuss the evidence in this case. Your Honor, as the trier of fact, has heard the [246] evidence, and observed the witnesses on the witness stand.

This case, it seems to me, resolves itself around a question of fact, and a basic principle of law, and I think the basic principle of law is applicable under the evidence in this case.

I think we have a typical pattern of a fiduciary retaining a trust in his personal possession, and taking an unfair advantage of his trust with his principle, and getting an unjust gain to himself personally.

Now, there are three elements involved, as I understand it, applicable to fiduciaries in this case.

One, did the fiduciary sustain a confidential relationship? Under the evidence, there can be no doubt about that in this case. From the testimony of the defendant himself he held a power of attorney of the decedent up in Montana, he was his business adviser, and his business agent, he was on his bank accounts, and he had access to his safety deposit box where his securities were kept, and from his own testimony, I submit there can be no other finding, if your Honor please, than that Mr. Grenier, the defendant, certainly was a fiduciary during the time that these transactions which have come out in the evidence took place, the bank accounts, and the deed, specifically, of May 16th was signed by this decedent.

The second point, undisputed in this case, too, is that [247] Mr. Grenier, from his own testimony, actively participated, and he procured the deed itself. He went to a stationery store, and bought it, took it to a public stenographer of his own choosing, and had it filled out, and the decedent had nothing to do with the preparation of the deed. Not only was there activity on the part of the defendant to get the deed prepared, but he was the

only one who had anything to do with it, so far as the direction of its preparation was concerned.

Also, he went to the bank and brought the notary over to Mr. Harley's house at the time the deed was executed. He was there, and he obtained the execution of the deed through his own activity. That is the second point of law, your Honor, that I believe is involved in this case.

And, of course, he unduly profited by the transaction, because he paid nothing for it.

So that, your Honor, raises the presumption of undue influence, under the evidence in the case, and the burden shifts to the defendant to show by a preponderance of the evidence, or substantial evidence, that he did not obtain the deed under undue influence.

Now, that is the argument that I have to make in a nutshell. Your Honor, as the trier of fact, will determine as to where the weight of the evidence is, and as to the credibility of the evidence, and the law I believe is just as I [248] have stated it.

The Estate of Pellegrini, which is the latest case which I have found on the subject matter, 138 Cal. App. 2d 143, hearing denied by the Supreme Court on February 15, 1956, sets forth the statement that I have just concisely made to your Honor.

So I submit the plaintiff's case on the argument that I have just made, your Honor.

The Court: Does the record here show that any of these wills here have been admitted to probate? I don't know that that has been shown.

Mr. Young: No, your Honor, no will has been admitted to probate. The only will that was filed, where a petition was filed for probate, was the will of July 28th, and a contest was filed before probate, so that will was never probated.

The next will, which will be offered for probate, is the will of April 7, 1955. The petition is now in preparation to offer that will for probate.

Thank you, your Honor.

Mr. Boshae: If your Honor please, I am inclined to agree with counsel, and I have enough trust and confidence in the court, and in your Honor's observation of the witnesses, that I am not going to go into any of the testimony, because it is all before you. You have listened to it for [249] a day and a half. The only thing I can say, your Honor, is that I think we have borne the burden of proof.

You have heard the testimony of our witnesses, and, primarily, this was a situation where the plaintiff has contended that the decedent was incompetent, the grantor was incompetent, by reason of his physical condition, by his sickness, by mental incapacity, and I think that that has been overcome not only by our witnesses, your Honor, but by his. None of the testimony of any of the witnesses for the plaintiff show any incompetency, so far as mental condition is concerned.

The Court: You don't need to spend any time on that.

Mr. Boshae: Thank you, your Honor. Now, so far as Mr. Grenier is concerned, the only thing is this: Your Honor is familiar with the law that in

order to vitiate a transaction, particularly a will or a deed, that the influence that is asserted on the part of the grantee or the beneficiary must exist as to the act itself.

We have tried to put on evidence, and I think we have, that the deed was brought—and it is uncontradicted, that the deed was brought to Mr. Harley by Mr. Grenier, and it was left there for a week, and he told several people that he wanted to deed the property to Mr. Grenier, and, in fact, both Mr. Harley and Mr. Joe Edgar knew of the transaction.

The Court: Don't we start here with the situation where [250] the evidence shows the fact that the decedent reposed such trust and confidence in the defendant—

Mr. Boshae: There is no question, your Honor, about that.

The Court: —that there existed in fact, if not in law—laying aside the attorney in fact relationship—there existed in fact a fiduciary or confidential relationship between the decedent and the defendant here?

Mr. Boshae: There is no question, your Honor, about it.

The Court: Now, the defendant received the conveyance admittedly without consideration. So where does that place him?

Mr. Boshae: It places him, your Honor, in the position that he has to show that he got the property with the knowledge of the grantor.

The Court: He has to show an intent to make a gift of the property to him, doesn't he?

Mr. Boshae: That is correct.

The Court: A donative intent on the part of the grantor?

Mr. Boshae: That is correct.

The Court: Now, what about Mr. Edgar's testimony? He mentioned that he, Edgar, mentioned to the defendant this deed, in the presence of the decedent, and he said something to this effect, "You did that in an effort to avoid involving this property in a will contest, and involving the decedent's [251] wife," I take it?

Mr. Boshae: Your Honor, I don't recall that he said that in front of the deceased. But assuming he did——

The Court: He said it to the defendant, and the defendant, according to Edgar, said, "That's right."

Mr. Boshae: That, your Honor, is a question of fact, for the simple reason that subsequent—prior and subsequent to that time, an individual who was just as close as Mr. Edgar, if not closer, the doctor, discussed it with him many times, on a number of occasions, and the fact that the testator or deceased had donative intent is reflected in the wills. There is no question but what he wanted to give him something.

The Court: There is no doubt about that. Of course, in this type of case we are always up against the situation that people, when they get that old, get a little bit childish, and even if they are not childish, perhaps they are a lot smarter than we

give them credit for being, they know the frailties of human nature pretty well, and they know that the greatest attention they can get is through their property, and this man would not be the first one who kept everybody on the anxious seat as to what he was going to do with his property.

Most lawyers have some elderly clients who, if they have much of anything at all, and don't have people too close to them who are certain to get it all, who dangle in front of [252] near relatives, and distant relatives, and friends, the thought that, "I am going to leave you something,"—and as I was about to say in that remark, most lawyers have had the experience of such people, who will change their wills to a point of being nuisances. They will change their wills in little ways to the point of being nuisances to the lawyers.

Now, it may be this man was that type, or he may have had a keen sense of humor about these people who were around him, like the nurse who wanted something. It may be that. So far as knowing what he intended, who can say but what this will that he on July 28th was what he actually intended? But that will has been found and adjudicated conclusively to have been invalid.

I am referring to his subjective intent now. All we can judge him by is the objective manifestation.

Mr. Boshae: That is the only thing I can argue by, your Honor. I don't know the man's mind internally. The only thing I can say is that he was before a court in April, 1955, and they declared him

to be competent to transact his business and his personal affairs.

The Court: Yet Judge Schweitzer found that at some time—well, he found that back for some time prior to the end of July, July 28th, that the man was not.

Mr. Boshae: That, your Honor, the ruling of Judge Schweitzer could only refer back to the execution of that [253] will. I don't think there is anything in the decree that says that he was incompetent at any specific time prior to July 28th.

The Court: These findings are binding upon your client, aren't they, in this proceeding?

Mr. Boshae: Certainly, they are.

The Court: Very well.

Mr. Boshae: And I think that the findings of the court and the guardianship proceedings are binding upon the plaintiff, and it would be more likely—

The Court: Yes, I suppose they are.

Mr. Boshae: And it would be more likely that the deceased would be in a frame of mind that he knew what he was doing on May the 16th, when the order was made declaring him a competent person in April, one month prior thereto, than it would be that he was incompetent when this order was made with reference to an act almost two and one-half months later.

The Court: I will find that he was competent, and that he was competent at the time that this deed was signed.

Now, we have this situation that I would like for you to address your remarks to. Apparently, Mr.

Edgar, who does not have any interest at all in the matter, as it appears, comes in and he swears on that stand three things:

One, he says that the defendant said to the decedent that he didn't want any of his property, wouldn't have any [254] of his property; two, that when the bank accounts were opened in joint tenancy, that the defendant repudiated any intention whatever to do anything but to turn the balances remaining after the death of the decedent over to the decedent's estate; and, three, the matter I have just adverted to, namely, that when the deed was brought up, the defendant agreed that the purpose of the conveyance of the Deer Lodge property to him, the defendant, was in an effort to keep it from being involved in the will contest over the wife's estate.

Mr. Boshae: May I answer those points, your Honor?

The Court: Yes, I would like to hear you on them.

Mr. Boshae: In connection with the first, your Honor, where Mr. Edgar says that the defendant did not want the property,—I think that was your first point. In the first place, that was denied by my client.

The Court: Yes. Now, let's just take that right now. We have to find the truth somewhere here from highly conflicting statements.

Mr. Boshae: I have some more remarks in connection with that, but that was the first point.

The Court: Yes. Now, there is an interest, and your client has a monetary interest to deny it. What

interest would Mr. Edgar have, to come in here and swear that it happened if it didn't happen?

Mr. Boshae: Your Honor, here we are running into a [255] situation where we have an admission, the testimony of an admission, and I think it is well established that admissions are to be taken with caution. That is the only evidence we have by Mr. Edgar which will have any bearing or any reflection that that was not intended as a gift.

In the first place, that was made by a third party, not by the grantor.

In the second place, Mr. Edgar was supposedly a legal adviser to the grantor.

Now, your Honor, you take that testimony, with the fact that he was supposed to supervise the estate of the deceased, and he knew one month later, that is, June 16th, he was told that that property was deeded to Mr. Grenier, and nothing was done about it.

The Court: What could be done about it? What would you have done about it, if you had been his attorney?

Mr. Boshae: I would have advised him, if I didn't think he did it legally, to bring an action to set it aside. And if the testator would have had confidence in me, as his legal adviser, he would have gone along with it.

But everybody knew, your Honor, that Mr. Grenier was a lifelong friend, that they had helped each other, that he wanted him to get the property, and that is why nothing was done about it.

The Court: There is no question that he wanted him to [256] have something.

Mr. Boshae: He wanted him to have that whole property, your Honor.

The Court: Then why would Mr. Grenier,—if that were true, why would Mr. Grenier adopt Mr. Edgar's suggestion that this conveyance was for the purpose of avoiding involving this real estate in the will contest?

Mr. Boshae: That was Edgar's testimony. That wasn't my client's testimony.

The Court: In other words, you are suggesting that I find that Edgar's testimony is not true?

Mr. Boshae: Even if you find it is true, your Honor,—even if you find it is true, that conversation took place prior to the execution of that deed.

The Court: About the Deer Lodge property?

Mr. Boshae: Yes, sir.

The Court: The conversation that he didn't want anything under the will took place prior to the deed?

Mr. Boshae: And, as I recall it, also the conversation where he said that he would take it to avoid it being involved in the Benifer estate, or whatever the relative's estate was.

The Court: That isn't my recollection. As I recall, it was after the deed was made.

Mr. Boshae: No, I recall it was before the deed was made, [257] that it was at some time when they were discussing, and if your Honor will look back in the record, it was along about that time, prior to the execution of the deed, that that conversation took place. I would like your Honor to refresh

your thoughts on it, if it is necessary to refer to the record.

The Court: Can you find Mr. Edgar's testimony, that portion of it?

The Reporter: I can find it, your Honor.

The Court: Will you refer to it, and read it, please?

(The portion of the testimony of Joseph H. Edgar referred to was read as follows:

"Q. All right. Now, where did you see Mr. Grenier on July 16, 1955?

"A. At 1330 Blossom Street.

"Q. And who all was there? Who else was present?

"A. Mr. Daniel Harley was there, Mr. Grenier was there, and I was there.

"Q. Did you have a conversation at that time with Mr. Grenier—— "A. I did.

"Q. ——with reference to the Deer Lodge, Montana property? "A. I did, sir.

"Q. All right. State that conversation. [258]

"The Court: Was it in the presence of Dan L. Harley?

"Mr. Young: Yes, Dan L. Harley. I understood he was there.

"The Court: Is that correct?

"The Witness: Yes, sir. Do you want the whole conversation that took place that day?

"Q. (By Mr. Young): Yes, state the conversation.

"A. Well, Mr. Grenier said that he understood—he told me, he said, 'I understand that Jimmy

Harley has been out to see Dan, and that he has talked to Dan about having a guardian appointed for him.'

"He said, 'Dan doesn't need a guardian.' He said he has—he said, 'If he does have one, it isn't going to be Jimmy Harley.' He said, 'I am perfectly capable of taking care of Dan's affairs.' He said, 'I have a power of attorney from Dan.' He said, 'I am paying the bills.' He said, 'I have—the accounts are in joint tenancy.' He said, 'I am taking care of all of the bills.'

"Q. What accounts did he refer to?

"A. The bank accounts.

"Q. Very well.

"A. I said to him—I don't know whether this was in sequence, but, anyhow, Dan was lying on the [259] couch, and had been confined either to the couch or bed for some time, and so I said to him, 'What is going to happen to those bank accounts when Dan dies? They are in joint tenancy, and,' I said, "under the law they will go to you.'

"He said, 'Just as soon as an executor is appointed for Dan's estate,' he said, 'I am going to turn those accounts over to him.'

"The Court: Who said that?

"The Witness: Mr. Joe Grenier.

"So to go back to the conversation, when the discussion about Jim Harley being appointed his guardian took place, he said, 'Jim Harley has always'—he says, 'is hardly more than a stranger to Dan, and he isn't going to be his guardian.' He said, 'Isn't that right, Dan?'

"And Dan said, answered the question, 'Yes.'

"Then I said to Mr. Grenier, I said, 'I understand that Dan has also deeded the Montana property to you.'

"He said, 'That's right.'

"I said, 'What is back of that? Does he intend to avoid the Tessie Harley will contest by doing that?'

"He said, 'That is right.' [260]

"Q. (By Mr. Young): That is what Mr. Grenier said? "A. Yes, sir.

"The Court: Did all this occur in the presence of Dan Harley?

"The Witness: It did, your Honor.

"The Court: Within his hearing?

"The Witness: Yes, your Honor.")

Mr. Boshae: All right. Your Honor, let's assume that is a fact. He didn't say Mr. Grenier was going to hold it to avoid the Harley will contest. Assuming that he was giving it to him, and that that conversation took place in July, it did not vitiate a deed that had been given prior thereto to Mr. Grenier, with the intention of conveying that property to him. There is nothing in that comment to show that Mr. Grenier was holding that property in trust for anybody.

May I have that comment again, please, Miss Reporter? Will you read that again?

(The portion of the record referred to was reread.)

Mr. Boshae: Will you mark that portion, please.

Now, if the court please, regardless of what the purpose of conveying this property was, if there was

an intention to convey that deed to Mr. Grenier, whether to avoid litigation, or anything else,—

The Court: Oh, if there was an intention to make a gift, there is no question about it.

Mr. Boshae: This was two months later.

The Court: But doesn't this negative an intention to make a gift?

Mr. Boshae: Not necessarily; not necessarily. This was a gift that was made two months prior, your Honor.

Now, from what I understand your Honor's observation to be, you are disregarding all the evidence of everyone else, and pinning your thoughts on Mr. Edgar's statement.

The Court: Well, your client didn't deny it.

Mr. Boshae: Yes, he did.

The Court: He denied all of this?

Mr. Boshae: Yes, sir. I asked him specifically on his examination, your Honor.

The Court: I didn't recall that you had asked him about it.

Mr. Boshae: Yes, I did, your Honor.

The Court: About the conversation with Edgar? I didn't recall it.

Mr. Boshae: I definitely recall it. If your Honor wants the reporter to refer to it—

The Court: No, I don't. Even assuming that, on what basis can I find that Edgar perjured himself?

Mr. Boshae: I am not saying he perjured himself. [262]

The Court: There is no room for mistake in this testimony.

Mr. Boshae: Then are we going to say that all the other people perjured themselves?

The Court: No. They didn't testify to the contrary of this. You can't say Edgar testified to that by mistake, can you?

Mr. Boshae: No, of course not.

The Court: All right. Then if you want to put it that way, it is a question of: Shall I believe your client, the defendant, or shall I believe Edgar?

Mr. Boshae: No, your Honor. Or are you going to believe the doctor, when he said, "I want to give this property to Mr. Grenier," and also the testimony of Mr. Jenkins, who said——

The Court: You proceed with your argument.

Mr. Boshae: Well, your Honor, if the court has made up its mind——

The Court: I have.

Mr. Boshae: Then, of course, there is no need of arguing.

The Court: I will be glad to listen to it, but I have listened to all of these witnesses, and I try to take into account human nature.

I don't find that this defendant defrauded the decedent, [263] but he stood in that peculiar relationship where, unless he can show the contrary, the law presumes, doesn't it?

Mr. Boshae: I submit, your Honor, we have overcome the presumption. If your Honor does not agree with me, that is something that I have no control of.

The Court: It is a question of constructive fraud. It is not actual fraud, it is a question of constructive fraud, the effect of it.

I find that the decedent was competent, that he had good eyesight, he knew what he was doing. I find that he gave this property in trust, through a constructive trust to the defendant, to hold for the purpose for which both the decedent and the defendant—the decedent by his silence and the defendant by his positive assertion declared to be the purpose of the trust: not a gift, but to hold it to avoid involving it in some litigation. He became constructive trustee of it, so he is obligated to reconvey it to the estate, and he is obligated to account to the estate for the rentals, less the necessary expenditures, which are represented by Defendant's Exhibit G.

In reaching this conclusion, I am doing it in the light of all the testimony, and in the light of the documentary evidence, namely, the successive documents, which the decedent also signed with as great a solemnity as the deed,—what is contained in those.

Mr. Boshae: May I ask the court to have a stay of execution for a definite period of time, to consult with my client on this matter?

The Court: Findings of fact and conclusions of law and judgment will be ordered in favor of the plaintiff and against the defendant, and will be prepared by the plaintiff, and lodged with the clerk within ten days, pursuant to Local Rule 7.

Now, as soon as the judgment is entered, if there

is any occasion to delay, I will be glad to hear you then.

Mr. Boshae: All right, your Honor.

The Court: But it will probably be at least two weeks. Is notice of the pendency of this action recorded up in Montana?

Mr. Young: Mr. Boshae told me it was. Did you file a *lis pendens*? I think you told me you had filed a notice.

Mr. Boshae: No, I didn't tell you there was a notice filed.

Mr. Young: I thought there was. I thought we had done it, your Honor.

The Court: Well, the defendant is restrained from making any disposition, or any encumbrance, or doing anything to affect the title of this property until further order of court.

Mr. Young: Thank you, your Honor. [265]

The Court: You understand the order, Mr. Grenier?

Mr. Grenier: I didn't get that, your Honor.

The Court: You are restrained from making any conveyance, or encumbering the property, or doing anything adversely to affect the title to the property.

Mr. Grenier: Yes. I can still collect rents?

The Court: Until further order of court. You are in effect trustee, as you have been all along, of the property.

I want to make it clear that I do not find any actual fraud. These men were fast friends, and it may well be that if Dan Harley were here to say

anything, he might well say, "Certainly, I will give it all to Joe Grenier." But I find that was not his intention while he was alive. If he had lived until this time, rather than see this litigation, he might have said so. But it is clear to me from the evidence that during Dan Harley's lifetime Joe Grenier himself considered that he held this property in trust, and he will be charged as a constructive trustee by reason of the presumption which arises from his fiduciary relationship, which the court finds has not been overcome by any of the evidence.

Is there anything further, gentlemen?

Mr. Boshae: Nothing further.

Mr. Young: Thank you, your Honor.

CERTIFICATE

I, Marie G. Zellner, hereby certify that I am a duly appointed, qualified and acting official court reporter of the United States District Court for the Southern District of California.

I further certify that the foregoing is a true and correct transcript of the proceedings had in the above-entitled cause on the date or dates specified therein, and that said transcript is a true and correct transcript of my stenographic notes.

Dated at Los Angeles, California, this 17th day of January, 1957.

MARIE G. ZELLNER,
Official Reporter.

[Endorsed]: Filed Feb. 21, 1957. [266]

[Endorsed]: No. 15459. United States Court of Appeals for the Ninth Circuit. Joe Grenier, Appellant, vs. James W. Harley, Special Administrator with General Powers of the Estate of Dan L. Harley, deceased, Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed: February 25, 1957.

Docketed: March 4, 1957.

PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

United States Court of Appeals
For The Ninth Circuit

No. 15459

JOE GRENIER, Appellant,

vs.

JAMES W. HARLEY, etc. Appellee.

APPELLANT'S STATEMENT OF POINTS

Comes Now the Appellant and submits herewith his Statement of Points:

I.

That the following Findings of Fact are not supported by the evidence:

The indicated portion of Finding No. 2.

“That defendant obtained the execution of said deed by the decedent through undue influence and constructive fraud practiced by defendant on the decedent.”

Finding No. 3. “That it was not the intention of the decedent in executing and delivering said deed to the defendant to make a gift of the real property described in said deed to defendant. That it was the intention of the decedent in executing and delivering said deed to the defendant to vest the title to the real property described in said deed in the defendant only as trustee for the decedent.”

Finding No. 6. “That the defendant holds the title to the real property described in said deed and described in paragraph I of Plaintiff’s Amendment to Plaintiff’s Amended Complaint as trustee for the Estate of Dan L. Harley, deceased.”

Finding No. 7. “That the allegations contained in paragraphs I and II of the Cross-complaint of the defendant are untrue; that the denials and allegations contained in paragraphs I and II of Plaintiff’s Answer to the Cross-complaint of defendant are true.”

II.

The following Conclusions of Law are not supported by the evidence and are contrary to law:

Conclusion No. 4. (The indicated portions thereof): “That plaintiff is entitled to judgment against defendant in the sum of \$4,230.00 representing the total rents collected by the defendant from the real property described in paragraph I of the Plaintiff’s Amendment to Plaintiff’s Amended Complaint since

June 1, 1955, to and including November 1, 1956. That defendant is entitled to a credit on said amount of \$4,230.00 in the sum of \$1,498.93 representing expenditures made by defendant for the necessary repairs and maintenance on said real property * * * leaving a balance due from defendant to plaintiff in the sum of \$2,731.07, together with interest in the amount of \$200.00, thereby making a total sum of \$2,931.07, which sum of money the defendant holds as trustee for the plaintiff."

The indicated portions of conclusion No. 6.

That plaintiff is entitled to judgment against defendant. Directing and ordering the defendant to execute the grant deed which has been lodged with the Clerk of the Court and which conveys said real property described in paragraph I of plaintiff's Amendment to Plaintiff's Amended Complaint to the Estate of Dan L. Harley, deceased; * * *"

Conclusion No. 9. "That plaintiff is entitled to judgment that defendant shall take nothing from plaintiff by reason of defendant's Cross-complaint on file herein."

Respectfully submitted,

/s/ GEORGE BOSHAE,

Attorney for Appellant.

Affidavit of Service by Mail Attached.

[Endorsed]: Filed March 4, 1957. Paul P. O'Brien, Clerk.

No. 15459

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JOE GRENIER,

Appellant,

vs.

JAMES W. HARLEY, Special Administrator with General
Power of the Estate of Dan L. Harley, deceased,

Appellee.

Appeal From the United States District Court for the
Southern District of California, Central Division.

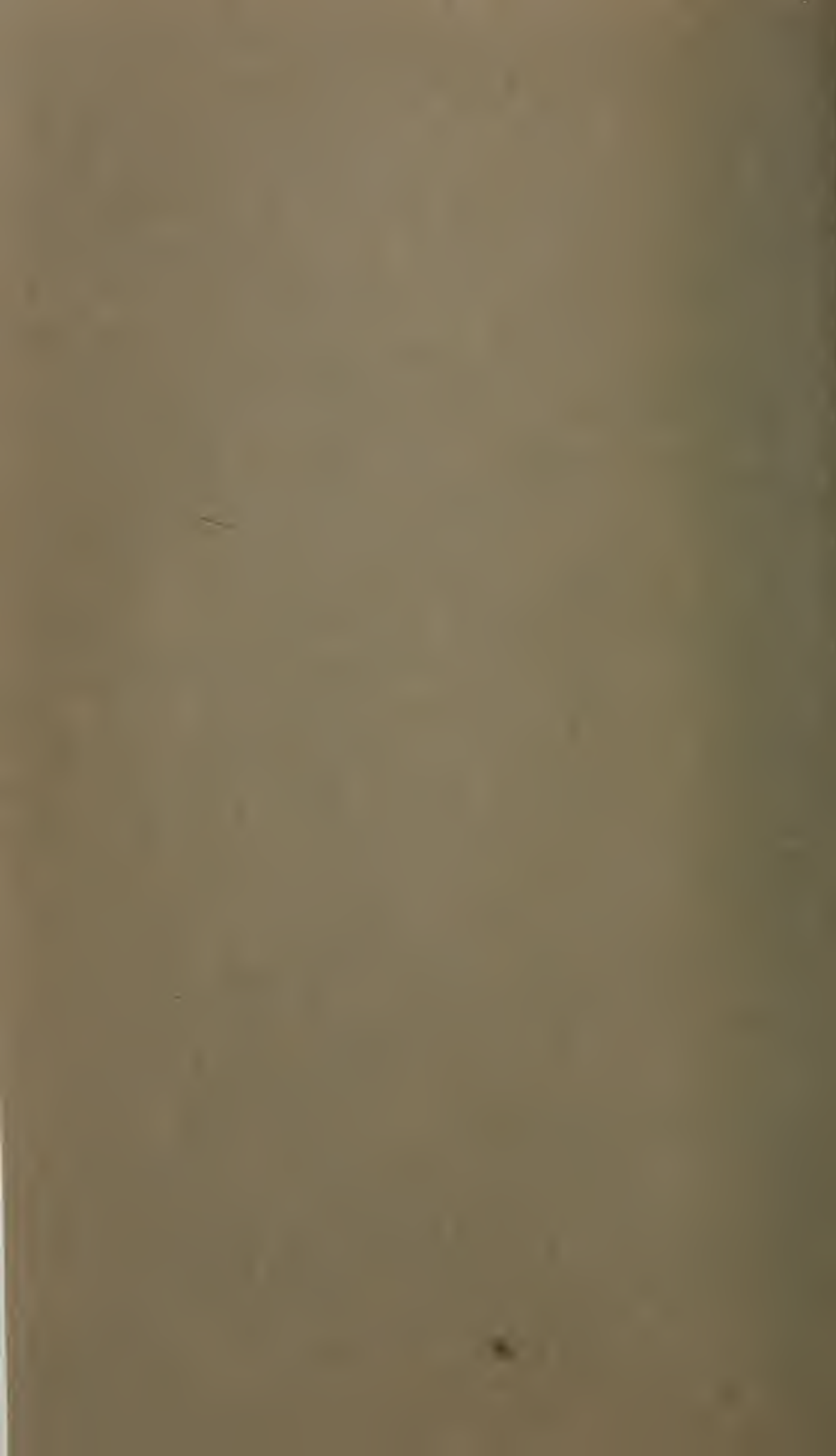
APPELLANT'S REPLY BRIEF.

GEORGE BOSHAЕ,
608 South Hill Street,
Los Angeles 14, California,
Attorney for Appellant.

FILED

JUL 3 1957

PAUL P. O'BRIEN, CLERK



TOPICAL INDEX

	PAGE
Appellant's witnesses	6
Conclusion	7

TABLE OF AUTHORITIES CITED

CASES	PAGE
Chandler v. United States, 226 F. 2d 403.....	3
Daniel v. First National Bank of Birmingham, 228 F. 2d 803.....	4
Magidson v. Duggan, 212 F. 2d 748.....	3
Reed v. Murphy, 232 F. 2d 668.....	3
Shepherd v. Mahannah, 220 F. 2d 737.....	3
Smyth v. Erickson, 221 F. 2d 1.....	2
States Steamship v. Permanente Steamship Corp., 231 F. 2d 82..	3
United States v. One 1950 Buick Sedan, 231 F. 2d 219.....	5
United States v. United States Gypsum Co., 333 U. S. 364.....	2

RULES

Federal Rules of Civil Procedure, Rule 52a.....	1, 2, 7
---	---------



No. 15459
IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

JOE GRENIER,

Appellant,

vs.

JAMES W. HARLEY, Special Administrator with General
Power of the Estate of Dan L. Harley, deceased,

Appellee.

Appeal From the United States District Court for the
Southern District of California, Central Division.

APPELLANT'S REPLY BRIEF.

Appellant welcomes appellee's reference to and the application of Rule 52a, F. R. C. P., inasmuch as the judicial construction of that rule by the Federal Appellate Courts seems to lend weight to and support the rule governing the California Appellate Courts with reference to appeals on grounds of insufficiency of the evidence. The rules enunciated by the California Courts are discussed on pages 11 and 12 of Appellant's Opening Brief.

An examination of the decisions construing that portion of Rule 52(a), F. R. C. P., providing that "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses," indicate that the courts rely largely upon the facts and evidence then before it for consideration.

The consolation which appellee is seeking by reference to Rule 52(a), *supra*, is clearly minimized if not entirely eliminated, if the rules declared by the cases cited by appellee and appellant herein are correctly applied to the present record on appeal.

“Under Rule 52a of the Federal Rules of Civil Procedure, 28 U. S. C. A., the findings of the trial court must be sustained unless clearly erroneous. Where, however, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed, the finding is clearly erroneous and must be set aside. *United States v. United States Gypsum Co.*, 333 U. S. 364, 68 S. Ct. 525, 92 L. Ed. 746.”

Smyth v. Erickson, 221 F. 2d 1.

Referring to Rule 52a, F. R. C. P., the opinion of the Court in *United States v. United States Gypsum Co.*, 333 U. S. 364, stated on pages 394 and 395:

“That rule prescribes that findings of fact in actions tried without jury ‘shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses.’ It was intended, in all actions tried upon the facts without a jury, to make applicable the then prevailing equity practice. Since judicial review of findings of trial courts does not have the statutory or constitutional limitations on judicial review of findings by administrative agencies or by a jury, this Court may reverse findings of fact, by a trial court where ‘clearly erroneous.’ The practice in equity prior to the present Rules of Civil Procedure was that the findings of the trial court when dependent upon oral testimony where the candor and credibility of the witnesses would best be judged, had great weight with the appellate court. *The find-*

ings were never conclusive, however. A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." (Italics ours.)

Shepherd v. Mahannah, 220 F. 2d 737, 739:

"The immediate question is whether the findings of the District Court are clearly erroneous. The findings of fact of a trial court are clearly erroneous within Rule 52 of the Federal Rules of Civil Procedure, 28 U. S. C. A., when (1) not supported by substantial evidence, (2) contrary to the clear preponderance of the evidence, or (3) based upon an erroneous view of the law. . . ."

Magidson v. Duggan, 212 F. 2d 748, 752;

States Steamship v. Permanente Steamship Corp.,
231 F. 2d 82;

Reed v. Murphy, 232 F. 2d 668.

"Though the District Judge made findings of fact, conclusions of law and filed a memorandum, Rule 52, Federal Rules of Civil Procedure, 28 U. S. C. A., we are empowered to overturn his decision since the ultimate finding on which the judgment appealed rests is a conclusion of law, or a mixed one."

Chandler v. United States, 226 F. 2d 403.

The appellee in his brief, pages 4-5, as he did during the trial, evades the issue by interjecting considerable comment on the inability of the deceased to comprehend the nature of his acts in executing the deed to appellant. In view of the overwhelming evidence against appellee's contention to the contrary, a finding that the decedent was competent was unavoidable. [R. 17, 244, 253.]

The basic issue is: Was the delivery of the deed accompanied with donative intent? Appellant urges that it was.

In his feeble attempt to sustain the judgment of the trial court, appellee commences by citing Code sections and California cases in his brief (p. 6) which bear no factual similarity whatsoever to the present controversy.

It is respectfully submitted that the cases cited by appellee are inapplicable and that the pertinent legal principles were discussed and correctly applied in the factually analogous decisions cited in appellant's opening brief.

Appellee devotes almost two pages of his brief (pp. 7 and 8) relating to a discourse between the trial court and appellant's counsel, of the process employed in arriving at its conclusion. Obviously this is not a part of the record which would support any finding. Answering this phase of appellee's argument, the following comments appear controlling:

"Appellee argues with much force that those findings resulted from inferences drawn by the District Court as to the intention of the parties, and not from any 'process of legal reasoning.' We do not agree, though the separation is difficult, and if we are mistaken in that respect, nevertheless, the evidentiary facts being without dispute, this Court is in substantially as good position as was the District Court to draw inferences and conclusions therefrom . . . In any event, on the entire evidence we are 'left with the definite and firm conviction that a mistake has been committed.' "

Daniel v. First National Bank of Birmingham,
228 F. 2d 803, 805.

"The Appellees have urged that this court cannot upset the district court's findings on facilitation and

probable cause unless those findings are clearly erroneous. But we are not here bound by Rule 52a of the Federal Rules of Civil Procedure. As we said in *Sears, Roebuck and Co. v. Johnson* . . . 219 F. 2d 590, 591, ‘. . . In disturbing a district court’s findings of basic facts, this court is guided by the ‘clearly erroneous’ provision of Rule 52(a). But Rule 52(a) is not applicable where, as here, the dispute is not as to the basic facts, but as to what inference (*i.e.*, ultimate fact) should reasonably be derived from the basic facts.’ This court by examining the basic facts found by the district court can determine as advantageously as the district court can whether or not a reasonable inference can be drawn from the basic facts that the car facilitated the transportation and sale of narcotics, and that probable cause existed.”

United States v. One 1950 Buick Sedan, 231 F. 2d 219, 223.

Irrespective of the trial court’s questions as quoted on page 9 of appellee’s brief, appellant reaffirms his content that the record is devoid of any evidence that the decedent heard the conversation between Mr. Edgar and Mr. Grenier or that the decedent understood the conversation. At most this observation would have been an inference from a conclusion. Conspicuous by its absence in appellee’s brief is the testimony and the effect thereof of plaintiff’s own witnesses in testifying that the decedent told them that he had deeded the property to appellant (without qualification) at a time when Dan L. Harley was able to and did express his intent and acts [R. 39] on June 18, 1955. Did the trial court arrive at its conclusion in the light of this testimony also?

Grasping at straws, appellee through his counsel has on pages 13 and 14 of his brief, alluded to a Superior

Court action supposedly litigated subsequent to the present appeal. Appellant is confident, without doubt, that this Honorable Court will not be misled by the impropriety of such a statement for obvious reasons. Appellee may have just as well advised this court that he is facing a contest of a very questionable (April 7th) will he is seeking to have admitted to probate purportedly executed by the decedent, Dan L. Harley, under the undue influence of appellee. All of which are not relevant to the present appeal.

Appellant's Witnesses.

In the concluding pages of appellee's brief, he relies upon the failure of a number of the appellant's witnesses in discussing the Montana property with decedent. May appellant respectfully direct the Court's attention to the fact that appellee made a major issue of the decedent's competency in executing the deed to appellant? To prove the decedent's competency, it became necessary to secure the testimony of witnesses who had known decedent, of both long and short duration. The fact that Dan Harley did not discuss his business affairs with everyone he knew, certainly attributed to him the qualities of a rational and sound business man.

With reference to Garnett Studebaker as a witness, appellee again demonstrates his "on the fence position." At the conclusion of plaintiff's case, appellee called Dr. Ogden as his witness [R. 132] at which time Dr. Ogden was not available. Appellant did call Dr. Ogden again and have him present for appellee at which time appellee refused to call him as their witness. [R. 193.] Similarly the appellee has adopted this attitude concerning Garnett Studebaker. Garnett Studebaker was just as available to appellee, if not more so, than appellant. The same pre-

sumption contended for by appellee against appellant on page 20 of his brief, could apply equally as forceful against appellee.

On page 9 of appellees' brief he states that the statement made by Mr. Edgar on July 16, 1955, to Mr. Grenier regarding the conveyance of the property to appellant [R. 42-43], were not denied by appellant. If appellee has examined the record with any degree of accuracy, he will observe that appellant did in effect deny any and all such statements made by Mr. Edgar, except that the conveyance was an unconditional gift [R. 230] to appellant.

Conclusion.

It is respectfully submitted that by the application of the rules announced by the authorities cited in this and appellant's opening brief pursuant to Rule 52(a), F. R. C. P., compel the conclusion that the findings of the trial court are clearly erroneous and that the record as a whole would warrant a definite and firm conviction that a mistake has been committed. The findings should be set aside and Judgment reversed.

Respectfully submitted,

GEORGE BOSHAE,

Attorney for Appellant.



No. 15465

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JAMES CALEB SANDNER, JR.,

Defendant-Appellant,

vs.

UNITED STATES OF AMERICA,

Plaintiff-Appellee.

Appeal From Judgment of the District Court for the Southern District of California, Central Division.

BRIEF FOR DEFENDANT-APPELLANT.

EDGAR G. WENZLAFF,

417 South Hill Street,
Los Angeles 13, California,

Attorney for Defendant-Appellant.

FILED

APR - 1 1957

PAUL P. DUBREUIL, Clerk



TOPICAL INDEX

	PAGE
Statement of the case—questions involved.....	1
Nature of the action.....	2
Statement of facts.....	3
Argument	9
Question One. Was the denial of the full conscientious objector status by the Selective Service Appeal Board to appellant without basis in fact, arbitrary and capricious?.....	9
Question Two. Was appellant illegally denied his right to an investigation, a hearing, a report by a hearing officer and a recommendation by the Department of Justice to the Board of Appeal upon the conscientious objector claim contrary to Section 6(j) of the Act and Regulations?.....	18

TABLE OF AUTHORITIES CITED

CASES	PAGE
Chernekov, William, Jr. v. United States, 219 F. 2d 721.....	18
Davis v. United States, 199 F. 2d 689.....	23
Dickinson v. United States, 346 U. S. 389.....	13
Estep case, 327 U. S. 122.....	13
Girouard v. United States, 328 U. S. 61.....	16
Jessen v. United States, 212 F. 2d 897.....	13
Johnson v. United States, 126 F. 2d 242.....	12
Knox v. United States, 200 F. 2d 398.....	23
Pine v. United States, 212 F. 2d 93.....	13
Sterrett v. United States, 216 F. 2d 659.....	24
United States v. Cotie, 114 Fed. Supp. 28.....	24
United States v. Frank, N. D. California, N. D., No. 33546, June 16, 1953.....	24
United States v. Fry, 203 F. 2d 638.....	23
United States v. Hartman, 209 F. 2d 366.....	13
United States v. Laier, 52 Fed. Supp. 392.....	23
United States v. Pakarski, 207 F. 2d 930.....	13
United States v. Peterson, 53 Fed. Supp. 760.....	23
United States v. Wilson, 215 F. 2d 443.....	13
Weaver v. United States, 210 F. 2d 815.....	13

EXECUTIVE ORDER

Executive Order No. 10363 (17 F. R. No. 119, pp. 5449-5452)..	24
---	----

REGULATIONS AND STATUTES

32 Code of Federal Regulations, Sec. 1622.14.....	10
32 Code of Federal Regulations, Sec. 1626.25	19
32 Code of Federal Regulations, Sec. 1626.26	19
Selective Service Regulations, Sec. 1622.14	10

	PAGE
Selective Service Regulations, Sec. 1626.25.....	2, 7, 19, 24
65 Statutes at Large, p. 83.....	24
United States Code, Title 50, App., Sec. 456(j).....	9, 24
United States Code, Title 50, App., Sec. 462	2, 6
Universal Military Training and Service Act, Sec. 6(j), (62 Stat. 609).....	2, 9, 19, 24, 25

TEXTBOOKS

Selective Service System, Conscientious Objection, Special Monograph No. 11, Vol. I, pp. 29-66 (Washington Govern- ment Printing Office, 1950).....	15, 16
Selective Service System, Conscientious Objection, Special Monograph No. 11, Vol. I, pp. 147, 150, 155 (Washington Government Printing Office, 1950).....	23



No. 15465

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JAMES CALEB SANDNER, JR.,

Defendant-Appellant,

vs.

UNITED STATES OF AMERICA,

Plaintiff-Appellee.

Appeal From Judgment of the District Court for the Southern District of California, Central Division.

BRIEF FOR DEFENDANT-APPELLANT.

Statement of the Case—Questions Involved.

I.

Was the denial of the full conscientious objector status by the Selective Service Appeal Board to appellant without basis in fact, arbitrary and capricious?

Trial Court says "No".

The Government says "No".

The appellant says "Yes".

II.

Was appellant illegally denied his right to an investigation, a hearing, a report by a hearing officer and a recommendation by the Department of Justice to the Board of

Appeal upon the conscientious objector claim contrary to Section 6(j) of the Act and Section 1626.25 of the regulations on his third appeal?

The Trial court says "No".

The Government says "No".

The appellant says "Yes".

Nature of the Action.

This is a criminal appeal and a draft law prosecution. Appellant seeks a review of his conviction and sentence of one year in the custody of the Attorney General for refusal to submit to induction into the Armed Forces of the United States. The indictment charged that appellant violated the Selective Service Act (U. S. C., Title 50, App., Sec. 462, Universal Military Training and Service Act). It is alleged that he refused to submit to induction.

On June 18, 1956, appellant was arraigned. He pled not guilty and waived the right of trial by jury. On October 18, 1956, the case was called for trial. The entire draft board file was received into evidence. At the close of the evidence by the Government appellant made a motion for judgment of acquittal. The motion was argued. The Court denied the motion. The Court found the defendant guilty as charged. Judgment and Sentence were entered November 5, 1956, committing the appellant to an institution to be designated by the Attorney General for a period of one year.

Notice of Appeal was timely filed. Bail was fixed at \$2500.00. That defendant has stay of execution until November 19, 1956. Petition for Modification of Sentence was filed November 14, 1956, and duly denied.

Statement of Facts.

James Caleb Sandner, Jr., was born June 21, 1930. On September 18, 1948, he registered with Local Board No. 11, at Newport, Kentucky. On July 1, 1949 the local board mailed him the Classification Questionnaire which was filled out and returned by him on July 10, 1949 and received by Local Board July 11, 1949.

In the Questionnaire he showed his name, birth date and birth place. He gave his address. He showed he was a full time student attending the University of Kentucky at Lexington, Kentuck majoring in a pre-law course.

He signed the conscientious objector blank in the Classification Questionnaire. He claimed classification as VI-E and was classified on August 3, 1949 as IV-E. He was then attending classes at the University of Kentucky.

In his "Special form for conscientious objector" filed July 13, 1949, he wrote that because of his belief in God's word as my superior authority and guide, I recognize Jehovah God and Christ Jesus as the Higher Powers and I am subject to their laws before all others of human relations. In my belief God's laws must be obeyed first.

He stated that he had studied the last ten years with the Covington, Kentucky Company of Jehovah Witnesses, under the direction and affiliation with the corporation known as the "Watchtower Bible & Tract Society, Brooklyn, N. Y." He stated that under no circumstances whatsoever do I believe in the use of force. He proved the depth of his conviction and sincerity. He stated, I have attended Bible studies, attended a course of Ministry at the local headquarters of our organization for about five years, have given public lectures pertaining to facts and doctrines of the Bible. I have given approxi-

mately 50 public Bible lectures, preaching orally from house to house in different locations throughout this area. I have written proof from the University of Kentucky that I have been exempt from all forms of militarism at this institution.

He states that he has baptised at a Convention of Jehovah Witnesses at Detroit, Michigan in 1940. He states that his parents are members of Jehovah Witnesses.

He states that the Bible states in many places that Christ was neutral towards nations when on earth, therefore his followers are instructed to do likewise in all affairs pertaining to things of this world. That his creed and authority is from the Bible.

He listed the schools he attended, specifying names and addresses.

He specified the names and addresses of his employers. He listed his places of residence, past and present. He gave the names of several persons as references.

The Local Board, on August 3, 1949 classed Sandner as a conscientious objector. He was placed in Class IV-E. On August 31, 1949 the Local Board classified him as I-A *without notice*. He was notified to appear before the Local Board September 21, 1949 and did appear before the Local Board September 28, 1949, with his father, who is also a member of Jehovah Witnesses. He based his conscientious objections on Bible passages, such as "Thou shall not kill." "He who lives by the sword shall die by the sword." The Board found no grounds, it stated, to change his classification from I-A. On October 9, 1949, Sandner wrote a letter requesting appeal. On February 23, 1951, he was classified I-A and referred to District Attorney. On April 12, 1951 he was classified I-A by Appeal Board.

On March 27, 1951, the hearing officer Ben L. Kesinger wrote a report to the Honorable Peyton Ford, Deputy Attorney General, Washington, D. C., regarding defendant-appellant, which was based substantially upon the F. B. I. report, a résumé of adverse or favorable evidence not being furnished to appellant. Peyton Ford, the Deputy Attorney General, did on April 11, 1951 write the Appeal Board concurring in the recommendation of the hearing officer, and citing the F. B. I. report that defendant-appellant was employed by a brewery and was known to drink to excess at times and was "wild". That he was irregular in his attendance at meetings of the Jehovah Witnesses. He was arrested once for disorderly conduct arising out of a traffic violation. He was involved in an altercation at a dance at Lexington, Kentucky with another boy and prevailed in the fisticuffs. That he is not a preacher but is desirous of studying law.

On May 8, 1951 appellant requested an appeal to the Presidential Appeal Board which was denied.

On August 2, 1951 appellant was ordered to report for Armed Forces Physical Examination on August 13, 1951, examined and found acceptable. On September 6, 1951 he was ordered to appear for induction September 21, 1951. This Order for Induction was on September 19, 1951 postponed until end of academic year of school in Santa Monica, California. On July 8, 1952 request for transfer from Covington, Kentucky to Local Board No. 106, 1200 South Santee Street, Los Angeles, California was made.

On July 11, 1952 he was transferred for induction to Local Board 106, 1200 Santee Street, Los Angeles, California. He was served with order to report for induction and on July 28, 1952 he refused to be inducted into

the Armed Forces of the United States. On October 16, 1952 Santa Monica City College advised Local Board No. 11 at Newport, Kentucky that he is no longer enrolled with them.

On April 6, 1953 a letter from National Headquarters of Selective Service System was sent to State Director of Selective Services System at Louisville, Kentucky, advising that the Notice Form SSS 110 had not been mailed to defendant on change of classification on June 18, 1952 and on August 3, 1949, two separate and distinct times which procedural errors show on page 8 of the Minutes of the Boards in registrant's file.

Defendant was indicted for Violation of U. S. C., Title 50 App., Section 462—Selective Service Act of 1948 which indictment was filed September 4, 1952 that he knowingly refused to be indicted into the Armed Forces of the United States. The case was called for trial April 13, 1953 and dismissed by The Honorable Judge William C. Mathes, District Judge for the Southern District of California, Central Division, at the request of the Government, on the ground that procedural rights were denied defendant, for not sending him Notice of Change of Classification Form SSS 110 and failure to produce the F. B. I. report of defendant.

That on June 8, 1953 he filed his special form for Conscientious Objector with Local Board No. 11, Newport, Kentucky setting forth substantially same reasons as set out in his first Conscientious Objector form hereinabove mentioned, together with a long letter dated June 3, 1953 attached thereto giving his religious beliefs as a Jehovah Witness to sustain and support such beliefs as a Conscientious Objector.

He was again classified as I-A and noticed under SSS Form 110, June 18, 1953. On June 25, 1953 defendant-appellant requested an appeal for a personal hearing before the Local Board who directed him to appear at Newport, Kentucky, July 15, 1953. He then requested a hearing before the Local Board in Los Angeles, California, which was denied.

On August 13, 1953 appellant was given a courtesy interview by Local Board No. 95 in California which was transcribed and sent to his Local Board in Kentucky. Affidavits from three different witnesses were attached showing the sincerity and good faith of appellant.

On September 9, 1953, he was classified again as I-A by the Local Board in Kentucky from which classification he appealed September 17, 1953 asking to be classified as I-O. On September 30, 1953, the cover sheet of appellant was sent to State Headquarters for Selective Service Commonwealth of Kentucky by the State Director of Manpower of Kentucky requesting that it be forwarded to the United States Attorney for a recommendation by the Department of Justice according to Section 1626.25 of Selective Service Regulations so that defendant could not contend that an error was made in not procuring a recommendation from the Department of Justice.

On August 17, 1954 hearing was had before hearing officer Mr. Euler appointed by Department of Justice in Los Angeles, California.

On January 12, 1955 appellant received notice from appeal board classifying appellant I-A. On February 10, 1955 cover sheet of Registrant was sent to Director National Headquarters calling attention to résumé of the Investigator's report dated December 6, 1954 but no copy was sent appellant for the hearing of August 17, 1954.

On May 4, 1955 Local Board in Kentucky reopened case of appellant of its own motion and sent appellant Notice form 110 classifying appellant I-A.

On May 11, 1955 appellant gave notice of appeal requesting appearance before board and enclosing new and additional evidence to the Local Board in the form of a certificate from his Congregational Head that he was in good standing as a Jehovah Witness which was forwarded to the appeal board.

On May 21, 1955 received Notice to appear June 8, 1955 before Local Board No. 11 at Newport, Kentucky.

On June 1, 1955 appellant asked for hearing before Local Board in Los Angeles which was denied June 9, 1955.

On June 17, 1955 mailed formal notice of appeal.

On July 20, 1955 for the first time appellant received copy of Department of Justice recommendation dated December 6, 1954.

On August 15, 1955 appellant sent long letter to appeal board refuting Department of Justice recommendation of December 6, 1954.

On September 28, 1955 received form No. 110 from Appeal Board classifying appellant I-A.

On November 23, 1955 Order transferring appellant to Los Angeles, California for induction filed.

On December 5, 1955 appellant refused to be inducted into the Armed Forces of the United States.

On May 23, 1956 Indictment was found against appellant.

On October 18, 1956 case called for trial and appellant found guilty.

ARGUMENT.

QUESTION ONE.

Was the Denial of the Full Conscientious Objector Status by the Selective Service Appeal Board to Appellant Without Basis in Fact, Arbitrary and Capricious?

The Trial Court says "No".

The Government says "No".

The appellant says "Yes".

There was no basis in fact for the denial of the claim for classification as a conscientious objector against combatant and noncombatant military service made by appellant.

Section 6(j) of the act (50 U. S. C. App. Sec. 456(j), 62 Stat. 609) provides:

"Nothing contained in this title shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. Religious training and belief in this connection means an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views or a merely personal moral code. Any person claiming exemption from combatant training and service because of such conscientious objections whose claim is sustained by the local board shall, if he is inducted into the armed forces under this title, be assigned to noncombatant service as defined by the President, or shall, if he is found to be conscientiously opposed to participation in such non-

combatant service, be deferred. Any person claiming exemption from combatant training and service because of such conscientious objections shall, if such claim is not sustained by the local board, be entitled to an appeal to the appropriate appeal board. Upon the filing of such appeal, the appeal board shall refer any such claim to the Department of Justice for inquiry and hearing. The Department of Justice, after appropriate inquiry, shall hold a hearing with respect to the character and good faith of the objections of the person concerned, and such persons shall be notified of the time and place of such hearing. The Department of Justice shall after such hearing, if the objections are found to be sustained, recommend to the appeal board that (1) if the objector is inducted into the armed forces under this title, he shall be assigned to noncombatant service as defined by the President, or (2) if the objector is found to be conscientiously opposed to participation in such noncombatant service, he shall be deferred. If after such hearing the Department of Justice finds that his objections are not sustained, it shall recommend to the appeal board that such objections be not sustained. The appeal board shall, in making its decision, give consideration to, but shall not be bound to follow the recommendation of the Department of Justice together with the record on appeal from the local board. Each person whose claim for exemption from combatant training and service because of conscientious objections is sustained shall be listed by the local board on a register of conscientious objectors."

Section 1622.14 of the Selective Service Regulations (32 C. F. R. §1622.14) provides:

"Class I-O: Conscientious Objector Available for Civilian Work Contributing to the Maintenance of

the National Health, Safety, or Interest.—(a) In Class I-O shall be placed every registrant who would have been classified in Class I-A but for the fact that he has been found, by reason of religious training and belief, to be conscientiously opposed to both combatant and noncombatant training and service in the armed forces.

“(b) Section 6(j) of title I of the Universal Military Training and Service Act, as amended, provides in part as follows:

“ ‘Religious training and belief in this connection means an individual’s belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views or a merely personal moral code.’ ”

The documentary evidence submitted by the appellant establishes that he had sincere and deep-seated conscientious objections against combatant and noncombatant military service which were based on his “relation to a Supreme Being involving duties superior to those arising from any human relation.” This material also showed that his belief was not based on “political, sociological, or philosophical views or a merely personal code,” but that it was based upon his religious training and belief as one of Jehovah’s Witnesses, being deep-seated enough to drive him to enter into a covenant with Jehovah.

In view of the fact that there is no contradictory evidence in the file disputing appellant’s statements as to his conscientious objections and there is no question of veracity presented, the problem to be determined here by this Court is one of law rather than one of fact. The question to be determined is: Was the holding by the

Selective Service Appeal Board (that the undisputed evidence did not prove appellant was a conscientious objector opposed to both combatant and noncombatant service) arbitrary, capricious and without basis in fact?

There is absolutely no evidence whatever in the draft board file that appellant was willing to do military service. All of his papers and every document supplied by him staunchly presented the contention that he was conscientiously opposed to participation in both combatant and noncombatant military service.

Congress did not intend to confer upon the draft boards or the district judge arbitrary and capricious powers in the exercise of their discretion. They have discretion to follow the law when the facts are undisputed. If there is a dispute, the boards have the jurisdiction to weigh the testimony. In the case of a denial of the conscientious objector status, if there is no dispute in the evidence and the documentary evidence otherwise establishes that the registrant is a conscientious objector, it is the duty of the court to hold that there is no basis in fact. It must conclude that there is an abuse of discretion, and that the classification is arbitrary and capricious. It is submitted that such is the case here. The undisputed evidence shows that the appellant is a conscientious objector entitled to the I-O classification. The denial of the classification is without basis in fact. The classification of I-A flies in the teeth of the evidence. Such classification is a dishonest one, making it unlawful. (*Johnson v. United States* (8th Cir.), 126 F. 2d 242, at p. 247.)

There was no weighing of the evidence. The reason is that there was no conflict in the evidence on the conscientious objector claim. By answering the questions, filling out the form properly and supporting it by proper

papers petitioner discharged his burden of proof. The burden then shifted to the Government to contradict the statements appearing in his draft board file. The papers that he signed and filed were not mere claims. They were evidence. Petitioner could be prosecuted for falsely answering the questions. These statements made under the pain of liability for false swearing were not contradicted by the Government. Petitioner discharged his burden. The Government failed to meet its burden by rebutting the undisputed proof submitted by petitioner. The rule of *Dickinson v. United States* (1953), 346 U. S. 389, applies. (*Pine v. United States* (4th Cir., 1954), 212 F. 2d 93, 96; *Weaver v. United States* (8th Cir., 1954), 210 F. 2d 815, 822-823; *Jessen v. United States* (10th Cir., 1954), 212 F. 2d 897, 900; *United States v. Hartman* (2nd Cir., 1954), 209 F. 2d 366, 368, 369-370; *United States v. Pekarski* (2nd Cir., 1953), 207 F. 2d 930; *United States v. Wilson* (7th Cir., 1954), 215 F. 2d 443, 446.) That the *Dickinson* case, *supra*, dealt with the ministerial status and not the conscientious objector claim makes no difference.

In the *Estep* case, the Court said that, in reviewing draft board files, judges are not to weigh the evidence to determine whether the classification was justified. A Court weighs the evidence only when there is some contradiction in the evidence. There must be some dispute before this burden falls upon the Court to determine whether the classification is justified. The Court added, however, that if there is no basis in fact for a classification after a review of the file by a Court, it would be the duty of the Court to hold that the classification was beyond its jurisdiction. (327 U. S., at p. 122.)

There is no basis in fact for the classification in this case because there are no facts that contradict the documentary proof submitted by the appellant.

It is respectfully submitted that the motion for judgment of acquittal should have been sustained because there is no basis in fact for the classification given by the draft boards and the denial of the total conscientious objector classification was arbitrary and capricious. The judgment of the Court below should be reversed, therefore, and the trial court directed to enter a judgment of acquittal.

The undisputed evidence shows that appellant is sincere in his objections. He is opposed to any form of participation in war by himself. This objection comes from an immovable belief in the Supreme Being. It is not based on sociological, political or philosophical beliefs. It is supported by the direct Word of God, the Bible. It is not a limited objection that he has. He is not willing to join the army as a noncombatant soldier or go in as a conscientious objector only to actual combat service. He objects to doing anything in the armed forces. He will not be a soldier.

It was well known to the Congress, the nation, the Government and the Courts of the United States that Jehovah's Witnesses are conscientiously opposed to noncombatant military service. They were not unaware that these objections of Jehovah's Witnesses are based on a belief in the supremacy of God's law above the obligations arising from any human relationship. These facts bring Jehovah's Witnesses within the plain words of the act. Twisting the words of the law and discoloring the act subvert the intent of Congress not to discriminate.

The strict construction of the act advocated by the Government and the Court below was not intended by Congress; Congress had in mind a liberal interpretation of its provision for conscientious objectors to protect the religious objector. The records of the hearings in Congress, the reports and the act all prove a broad exemption was intended. Congress had in mind that objection to war is a part of the religious history of this country. Conscientious objection was recognized by Massachusetts in 1661, by Rhode Island in 1673 and by Pennsylvania in 1757. It became part of the laws of the colonies and states through American history. It finally became part of the national fabric during the Civil War and has grown in breadth and meaning ever since. (See Selective Service System, Conscientious Objection, Special Monograph No. 11, Vol. I, pp. 29-66, Washington Government Printing Office, 1950.) So strongly was the principle that President Lincoln and his Secretary of War thought that conscientious objectors had to be recognized. This is impressed upon by the Special Monograph No. 11, Vol. I, *supra*, at page 43:

“At the end of hostilities Secretary of War Stanton said that President Lincoln and he had ‘felt that unless we recognize conscientious religious scruples, we could not expect the blessing of Heaven.’ ”

As appears above, the Selective Service System in Special Monograph No. 11, Vol. 1, carries the history far back, even before the American Revolution. (*Ibid.*, pp. 29-35.) Virginia and Maryland exempted the Quakers from service. (*Ibid.*, p. 27.) From the Revolution to the Civil War provision for exemption of conscientious objectors appears in the state constitutions. During the Civil War the military provost marshal was authorized

to grant special benefits to noncombatants under Section 17 of the act, approved February 24, 1864. Lincoln was urged to force conscientious objectors into the army. He replied:

“No, I will not do that. These people do not believe in war. People who do not believe in war make poor soldiers. . . . These people are largely a rural people, sturdy and honest. They are excellent farmers. The country needs good farmers fully as much as it needs good soldiers. We will leave them on their farms where they are at home and where they will make their contributions better than they would with a gun.” (*Ibid.*, pp. 42-43.)

Congress certainly must have had in mind the historic national policy of fair treatment to conscientious objectors. The well-known governmental sympathy toward the Quakers and others was not ignored by Congress when the act was passed. Congress must have had in mind the historic considerations enumerated by the Supreme Court in *Girouard v. United States*, 328 U. S. 61. (Read 328 U. S. at pp. 68-69.)

In passing the provisions for conscientious objection to war in all the draft laws Congress had this long history in mind. It intended to preserve the freedom of religion and conscience in regard to conscientious objection, and it provided a law whereby such freedom could be preserved.

In the recommendation of the Department of Justice dated December 6, 1954 attaching résumé of the F. B. I. report, and made a part of the recommendation, it makes the statement that registrant (appellant) did not base his claim on the teachings or doctrines of Jehovah Witnesses, nor any other organization or denomination and

obviously was taken from a piecemeal statement appellant made to said hearing officer. We refer your honorable attention throughout the whole file of registrant (appellant) and particularly to appellant's "Special Form for Conscientious Objector" where he states he has attended Covington, Kentucky Company of Jehovah Witnesses for the last ten years. It is not clear then why the Hearing Officer found that appellant based his teachings and religious beliefs upon his own moral code, his own personal moral philosophy, and his own sociological views, founded upon his interpretation of and conclusions from his study of the Bible. The finding of the hearing officer is without basis in fact. The résumé of the F. B. I. report dated June 15, 1954 contains more favorable evidence and some unfavorable evidence which boiled down amounts to a few boyhood episodes during school days mostly such as working for a brewery, drinking beer, having fist-cuffs with another boy over a girl, a traffic violation, and being "wild", and having a pen knife in his hand on one occasion before an altercation. From what the Justice Department states in its letter on file, "The impression is given by the hearing officer that he served 10 days in jail for traffic violation" which is refuted by appellant and not true. The truth is the sentence was suspended. See letter of appellant in file refuting above dated August 15, 1955. After reading the favorable evidence it is difficult to see what is meant by being "wild". All of the episodes occurred while he was a boy and a very young man, and most of them many years ago.

Since then he has married, settled down, has a child, works steadily, attends church regularly and has received a certificate from his congregational head that he is in good standing as a Jehovah Witness, which certificate

has been filed with the local board. These episodes mostly from his boyhood days have no bearing on his religious faith, belief, and sincerity now, and can happen to any boy. A single conviction for drunkenness is recorded against appellant. "We are all children of Eve". Similar situation as to drinking in the case of *William Chernekoff, Jr. v. United States of America*, 219 F. 2d 721 (9th Cir.), February 24, 1955.

QUESTION TWO.

Was Appellant Illegally Denied His Right to an Investigation, a Hearing, a Report by a Hearing Officer and a Recommendation by the Department of Justice to the Board of Appeal Upon the Conscientious Objector Claim Contrary to Section 6(j) of the Act and Regulations?

The Trial Court says "No".

The Government says "No".

The appellant says "Yes".

The record shows that on July 20, 1955, for the first time appellant received a copy of the Department of Justice recommendation of December 6, 1954. This was too late for the second hearing on appeal about January 12, 1955, so Local Board seeing the fatal error again reopened said appellant's case and appellant was again classified as I-A by the Board of Appeals September 28, 1955, this time without a hearing before the hearing officer of the Justice Department, without a résumé of the F. B. I. report and without a recommendation from the Department of Justice.

The failure on the part of the appeal board to have the conscientious objector claim investigated, reported upon and a recommendation made by the Department of

Justice denies procedural due process contrary to Section 6(j) of the Universal Military Training and Service Act and Section 1626.25 of the Regulations on his third appeal.

Section 6(j) of the Universal Military Training and Service Act reads:

“Upon the filing of such appeal, the appeal board shall refer any such claim to the Department of Justice for inquiry and hearing. The Department of Justice, after appropriate inquiry, shall hold a hearing with respect to the character and good faith of the objections of the person concerned, and such person shall be notified of the time and place of such hearing. The Department of Justice shall, after such hearing, if the objections are found to be sustained, recommend to the appeal board that (1) if the objector is inducted into the armed forces under this title, he shall be assigned to noncombatant service as defined by the president, or (2) if the objector is found to be conscientiously opposed to participation in such noncombatant service, he shall be deferred. If after such hearing the Department of Justice finds that his objections are not sustained, it shall recommend to the appeal board that such objections be not sustained. The appeal board shall, in making its decision, give consideration to, but shall not be bound to follow, the recommendation of the Department of Justice together with the record on appeal from the local board.”

Sections 1626.25 and 1626.26 of the regulations (32 C. F. R. §§1626.25 and 1626.26) before June 17, 1952, provided:

“1626.25. *Special Provisions When Appeal Involves Claim That Registrant Is a Conscientious Objector.*—(a) If an appeal involves the question

whether or not a registrant is entitled to be sustained in his claim that he is a conscientious objector, the appeal board shall take the following action:

“(1) If the registrant has claimed, by reason of religious training and belief, to be conscientiously opposed to participation in war in any form and by virtue thereof to be conscientiously opposed to combatant training and service in the armed forces, but not conscientiously opposed to noncombatant training and service in the armed forces, the appeal board shall first determine whether or not such registrant is eligible for classification in a class lower than Class I-A-O. If the appeal board determines that such registrant is eligible for classification in a class lower than I-A-O, it shall classify the registrant in that class. If the appeal board determines that such registrant is not eligible for classification in a class lower than Class I-A-O, but is eligible for classification in Class I-A-O, it shall classify the registrant in that class.

“(2) If the appeal board determines that such registrant is not eligible for classification in either a class lower than Class I-A-O or in Class I-A-O, the appeal board shall transmit the entire file to the United States Attorney for the judicial district in which the office of the appeal board is located for the purpose of securing an advisory recommendation from the Department of Justice.” (Emphasis added.)

“(3) If the registrant claims that he is, by reason of religious training and belief, conscientiously opposed to participation in war in any form and to be conscientiously opposed to participation in both combatant and noncombatant training and service

in the armed forces, the appeal board shall first determine whether or not the registrant is eligible for classification in a class lower than Class I-O. If the appeal board finds that the registrant is not eligible for classification in a class lower than Class I-O, but does find that the registrant is eligible for classification in Class I-O, it shall place him in that class.

“(4) If the appeal board determines that such registrant is not entitled to classification in either a class lower than Class I-O or in Class I-O, it shall transmit the entire file to the United States Attorney for the judicial district in which the office of the appeal board is located for the purpose of securing an advisory recommendation from the Department of Justice.

“(b) No registrant’s file shall be forwarded to the United States Attorney by any appeal board and *any file so forwarded shall be returned, unless in the ‘Minutes of Action by Local Board and Appeal Board’ on the Classification Questionnaire (SSS Form 100) the record shows and the letter of transmittal states that the appeal board reviewed the file and determined that the registrant should not be classified in either Class I-A-O or Class I-O under the circumstances set forth in subparagraphs (2) or (4) of paragraph (a) of this section.*” (Emphasis added.)

“(c) The Department of Justice shall thereupon make an inquiry and hold a hearing on the character and good faith of the conscientious objections of the registrant. The registrant shall be notified of the time and place of such hearing and shall have an opportunity to be heard. If the objections of the registrant are found to be sustained, the Depart-

ment of Justice shall recommend to the appeal board (1) that if the registrant is inducted into the armed forces, he shall be assigned to noncombatant service, or (2) that if the registrant is found to be conscientiously opposed to participation in such noncombatant service, he shall in lieu of induction be ordered by his local board to perform for a period of twenty-four consecutive months civilian work contributing to the maintenance of the national health, safety, or interest. If the Department of Justice finds the objections of the registrant are not sustained, it shall recommend to the appeal board that such objections be not sustained.

“(d) Upon receipt of the report of the Department of Justice, the appeal board shall determine the classification of the registrant, and in its determination it shall give consideration to, but it shall not be bound to follow, the recommendation of the Department of Justice and the report of the hearing officer of the Department of Justice.

“1626.26. Decision of Appeal Board.—(a) The appeal board shall classify the registrant, giving consideration to the various classes in the same manner in which the local board gives consideration thereto when it classifies a registrant, except that an appeal board may not place a registrant in Class IV-F because of physical or mental disability unless the registrant has been found by the local board or the armed forces to be disqualified for any military service because of physical or mental disability.

“(b) Such classification of the registrant shall be final, except where an appeal to the president is taken; provided, that this shall not be construed as prohibiting a local board from changing the classification of a registrant in a proper case under the provisions of part 1625 of this chapter.”

The denial of a hearing provided for by the regulations before draft boards is a denial of due process. (*United States v. Peterson*, 53 Fed. Supp. 760 (N. D. Calif. S. D.); *United Ctates v. Laier*, 52 Fed. Supp. 392 (N. D. Calif. S. D.); *United States v. Fry*, 203 F. 2d 638 (2nd Cir.); *Davis v. United States*, 199 F. 2d 689 (6th Cir.); compare *Knox v. United States*, 200 F. 2d 398 (9th Cir.).)

General Lewis B. Hersey, in the publication entitled "Conscientious Objection" said:

"The Department of Justice and Selective Service took the position that each time the case of a registrant who claimed to be a conscientious objector came before a board of appeal, the case must be referred to the Department of Justice for its recommendation. This was felt to be the direct application of the law. In addition such reference was necessary because new factors in the case might be brought to light by the Department's investigation and hearing. . . ." (Emphasis added.) (See Selective Service System, Conscientious Objection, Special Monograph No. 11, Vol. I, pp. 147, 150, 155, Washington, Government Printing Office, 1950.)

Since the right to the investigation flows from the taking of the appeal, it is absolutely mandatory that the inquiry and hearing be conducted by the Department of Justice in every case where there is an appeal to the appeal board and where a claim for classification as a conscientious objector is involved in such appeal, regardless of prior investigations.

The undisputed evidence shows that upon the appeal of the case to the appeal board on the last and third appeal of appellant and *after new and additional evidence*

was submitted to the board consisting of a certificate from the congregational head of the Jehovah Witnesses showing appellant to be in good standing as a member of his congregation, no hearing was conducted by the Department of Justice as to appellant's conscientious objector claim, pursuant to Section 1626.25 of the regulations as amended by Executive Order of the President No. 10,363, Volume 17, Federal Register No. 119, Wednesday, June 18, 1952, pages 5449 to 5452, in conflict with the act, and it deprived appellant of a full and fair consideration by the appeal board, thus nullifying the entire draft board proceedings.

AUTHORITIES:

United States v. Frank, N. D. Calif. N. D., No. 33546, June 16, 1953;

Sterrett v. United States (9th Cir., Oct. 25, 1954), 216 F. 2d 659;

United States v. Cotie (N. D. N. Y., 1953), 114 Fed. Supp. 28.

The appeal board deprived defendant (appellant) of procedural due process of law when appellant's case was not referred to the Department of Justice on the third appeal for appropriate inquiry and hearing as to his current conscientious objector claim, contrary to Section 6(j) of the act and Section 1626.25 of the regulations.

AUTHORITIES:

50 U. S. C. App. Sec. 456(j), 65 Stat. 83;

32 C. F. R. Sec. 1626.25.

It is submitted that the failure to conduct an investigation, make a report after an oral hearing and send a

recommendation to the appeal board by the Department of Justice deprived appellant of his procedural rights contrary to Section 6(j) of the act.

Wherefore the appellant prays that a judgment of acquittal be entered by this Court declaring the draft board order to report for induction void and indictment dismissed.

Date: March 28, 1957.

Respectfully submitted,

EDGAR G. WENZLAFF,

Attorney for Defendant-Appellant.



No. 15465

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JAMES CALEB SANDNER, JR.,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF OF APPELLEE.

LAUGHLIN E. WATERS,
United States Attorney,

LOUIS LEE ABBOTT,
Assistant U. S. Attorney,
Chief, Criminal Division,

JOHN K. DUNCAN,
Assistant U. S. Attorney,
600 Federal Building,
Los Angeles 12, California,
Attorneys for Appellee,
United States of America.

FILED

JUN - 1 1957

PAUL P. O'BRIEN, CLERK



TOPICAL INDEX

	PAGE
I.	
Statement of jurisdiction.....	1
II.	
Statute involved	2
III.	
Statement of the case.....	3
IV.	
Statement of the facts.....	4
V.	
Argument	7
1. There was a basis in fact for appellant's classification.....	7
2. Appellant was not denied procedural due process because of the failure to grant him a hearing before a Department of Justice Hearing Office prior to the Appeal Board classification of September 23, 1955.....	9
VI.	
Conclusion	14
Appendix :	
Exhibit A. Letter of December 6, 1954, to Chairman, Appeal Board, Eastern District of Kentucky.....App. p.	1
Exhibit B. Letter of August 15, 1955, to Appeal Board, Eastern District of Kentucky.....App. p.	4

TABLE OF AUTHORITIES CITED

CASES	PAGE
Clark v. United States, 236 F. 2d 13.....	11, 12
Dates v. United States, 348 U. S. 966.....	11
Davidson v. United States, 218 F. 2d 609, cert. granted 348 U. S. 407.....	10
DeMoss v. United States, 349 U. S. 918.....	11
Dickinson v. United States, 346 U. S. 389.....	7
Estep v. United States, 327 U. S. 114.....	7
Frank v. United States, 236 F. 2d 39.....	12
Gaston v. United States, 222 F. 2d 818.....	9
Gonzales v. United States, 348 U. S. 407.....	5
Kaline v. United States, 235 F. 2d 54.....	12
Uffelman v. United States, 230 F. 2d 297.....	12
Witmer v. United States, 348 U. S. 375.....	8

REGULATIONS

32 Code of Federal Regulations, Sec. 1622.1(c)	9
32 Code of Federal Regulations, Sec. 1626.25.....	4

STATUTES

United States Code, Title 18, Sec. 3231.....	2
United States Code, Title 28, Sec. 1291.....	2
United States Code, Title 50, App., Sec. 462.....	1, 2

No. 15465

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JAMES CALEB SANDNER, JR.,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF OF APPELLEE.

I.

STATEMENT OF JURISDICTION.

Appellant was indicted by the Federal Grand Jury in and for the Southern District of California on May 23, 1956, under Section 462 of Title 50, Appendix, United States Code, for refusing to submit to induction into the Armed Forces of the United States [Clk. Tr. pp. 1 and 2]. Appellant was duly arraigned before the Honorable William C. Mathes, United States District Judge, on June 18, 1956. A plea of "Not Guilty" was entered and the case was set for trial. Trial was commenced on October 18, 1956 before the Honorable Leon R. Yankwich in the United States District Court for the Southern District of California. On October 19, 1956 appellant was found guilty as charged in the Indictment. Appellant was

sentenced on November 5, 1956 to the custody of the Attorney General for imprisonment for a period of one year.

The District Court had jurisdiction of the Cause of action under Section 462, Title 50, Appendix, United States Code, and Section 3231, Title 18, United States Code. This Court has jurisdiction under Section 1291, Title 28, United States Code.

II.

STATUTE INVOLVED.

The Indictment in this case was brought under Section 462 of Title 50, Appendix, United States Code. The Indictment charges a violation of Section 462 of Title 50, Appendix, United States Code, which provides in pertinent part:

“(a) Any . . . person charged as herein provided with the duty of carrying out any of the provisions of this Title (Sections 451-470 of this Appendix), or the rules or regulations made or directions given thereunder, who shall knowingly fail or neglect to perform such duty . . . or who in any manner shall knowingly fail or neglect to perform such duty . . . or who in any manner shall knowingly fail or neglect or refuse to perform any duty required of him under oath in the execution of this Title (said Sections), or rules, regulations, or directions made pursuant to this Title (said Sections) . . . shall, upon conviction in any District Court of the United States of competent jurisdiction, be punished by imprisonment for not more than 5 years or a fine of not more than \$10,000, or by both such fine and imprisonment. . . .”

III.

STATEMENT OF THE CASE.

The Indictment returned on May 23, 1956, charges that the appellant was duly registered with Local Board No. 11, Newport, Kentucky. He was thereafter classified I-A and notified to report for induction in the Armed Forces of the United States on December 5, 1955, in Los Angeles County, California. The Indictment charges that the defendant at that time and place did knowingly fail and refuse to be inducted into the Armed Forces of the United States. On June 18, 1956 appellant was arraigned before the Honorable William C. Mathes, United States District Judge. A plea of "Not Guilty" was entered and the case was set for trial. Trial was commenced on October 18, 1956 before the Honorable Leon R. Yankwich without a jury. Pursuant to stipulation, a photo-static copy of appellant's Selective Service file was placed into evidence. On October 19, 1956 appellant was found guilty as charged in the Indictment. On November 5, 1956 appellant was sentenced to the custody of the Attorney General for imprisonment for a period of one year. Motion for a new trial was made and denied on November 14, 1956, at which time Notice of Appeal was filed and bail pending appeal fixed at \$2,500.

Appellant relies upon the following points in the prosecution of his appeal:

1. Appellant's Selective Service Classification of I-A was arbitrary and capricious and without basis in fact.
2. Appellant was denied procedural due process because of the failure to grant him a hearing before a Department of Justice Hearing Officer prior to the Appeal Board Classification of September 23, 1955.

IV.

STATEMENT OF THE FACTS.

Appellee adopts generally the statement of facts presented by appellant in his Opening Brief. However, appellee wishes to emphasize the following facts, inasmuch as they are crucial to the ultimate disposition of this case.

Appellant registered under the Universal Military Training and Service Act with Local Board No. 11, Newport, Kentucky, on September 18, 1948. Appellant moved to Southern California in the Fall of 1951 and apparently has continued living there up to the present time. The first classification pertinent to the instant prosecution is a classification of I-A, arrived at by Local Board No. 11 on September 9, 1953.* Appellant appealed this classification and the Appeal Board forwarded the Selective Service file to the United States Attorney for a recommendation by the Department of Justice pursuant to 32 C. F. R. 1626.25. Accordingly, a Hearing on appellant's claim for exemption as a conscientious objector was given to appellant on August 17, 1954 before Louis J. Euler, a Department of Justice Hearing Officer for the Southern District of California. The Hearing

*Appellee regrets that it is impossible to indicate pagination in Exhibit 2, which is a photostatic copy of the Selective Service file of registrant. At the time the Exhibit was placed into evidence, there were no page numbers indicated on it. The Exhibit is in chronological order, however, and the Minutes of Action of the Local Board and Appeal Board will be found attached to the Selective Service System Form 100, which bears the title, "Selective Service System Classification Questionnaire."

Officer recommended that registrant's claim as a conscientious objector be not sustain. (See letter of December 6, 1954 to Chairman, Appeal Board, Eastern District of Kentucky, Appendix A.) After receiving the recommendation of the Hearing Officer, the Department of Justice recommended to the Appeal Board for the Eastern District of Kentucky that appellant's claim as a conscientious objector be not sustained (letter dated December 6, 1954, Appendix A). On January 7, 1955 appellant was classified I-A by the Appeal Board for the Eastern District of Kentucky. On May 4, 1955 appellant's classification was reopened by Local Board No. 11, apparently as a result of the ruling of the Supreme Court in *Gonzales v. United States*, 348 U. S. 407 (see letter dated May 4, 1955 addressed to Mr. James Caleb Sandner, Jr.) appellant was classified I-A. By letter dated May 11, 1955 appellant appealed the I-A classification. He also requested a personal appearance before the Local Board, which request was granted and appellant advised by a letter from the Local Board on May 23, 1955. Appellant then requested, by letter of June 1, 1955, that he be granted a personal hearing before a Local Board in the Los Angeles, California, area. The Local Board, after corresponding with the Kentucky State Selective Service Headquarters, advised appellant by letter on June 9, 1955 that his request for a personal appearance before a Board in Los Angeles, California, was denied. Appellant was also requested in this letter to furnish any additional evidence substantiating his conscientious objector

claim, in order that it might be before the Appeal Board at the time it classified appellant.

Appellant did not appear for his personal hearing before Local Board No. 11 on June 8, 1955. Appellant's file was forwarded to the Appeal Board by the Local Board and by the Appeal Board to the United States Attorney for the Eastern District of Kentucky for a Department of Justice recommendation. By letter dated July 12, 1955 the United States Attorney for the Eastern District of Kentucky returned appellant's file to the Appeal Board, with the recommendation that the Appeal Board send a copy of the recommendation of the Department of Justice of December 6, 1954 to appellant and inform him that he had thirty days to file a written reply. Accordingly, a copy of the Department of Justice recommendation was sent to appellant on July 20, 1955. By letter dated August 15, 1955 appellant replied to the Appeal Board, and set out information substantiating his claim as a conscientious objector. On September 23, 1955 the Appeal Board for the Eastern District of Kentucky classified appellant I-A. Appellant was ordered to report for induction by Local Board No. 106, a Transfer Board in Los Angeles, California. Appellant was to report on December 5, 1955; appellant appeared at the Induction Station as directed, but refused to be inducted into the Armed Forces.

V.

ARGUMENT.

1. There Was a Basis in Fact for Appellant's Classification.

It has long been settled that the scope of review to which a Selective Service registrant is entitled in a prosecution for refusing to submit to induction is quite limited. "The provision making the decisions of the Local Boards 'final' means to us that Congress chose not to give administrative action under this Act the customary scope of judicial review which obtains under other statutes. It means that the Courts are not to weigh the evidence to determine whether the classification made by the Local Boards was justified. The decisions of the Local Board made in conformity with the regulations are final, even though they may be erroneous. The question of jurisdiction of the Local Board is reached only if there is no basis in fact for the classification which it gave the registrant." *Estep v. United States*, 327 U. S. 114 at page 122 (1946). "If the facts are disputed, the Board bears the ultimate responsibility for resolving the conflict—the Courts will not interfere." *Dickinson v. United States*, 346 U. S. 389 at page 396 (1953).

It is respectfully submitted that a cursory examination of appellant's Selective Service file readily establishes "basis in fact" for a I-A Classification. It will be noted that appellant claimed conscientious objector status as early as July 10, 1949, when he filed his Selective Service System Classification Questionnaire. The résumé of the

FBI investigation, which investigation was conducted after appellant's appeal of his I-A Classification of September 9, 1953, was prepared on June 15, 1954. An examination of the investigative résumé clearly indicates that there were more than ample objective acts upon which the Appeal Board could base a I-A Classification. Inasmuch as the Appeal Board was dealing with the subjective state of mind of appellant, it was proper to consider his objective acts in determining his subjective state of mind. ". . . The ultimate question in conscientious objector cases is the sincerity of the registrant in objecting, on religious grounds, to participation in war in any form. In these cases, objective facts are relevant insofar as they help in determining the sincerity of the registrant in his claimed belief, purely a subjective question. In conscientious objector cases, therefore, any fact which casts doubt on the veracity of the registrant is relevant . . . in short, the nature of the registrant's prima facie case determines the type of evidence needed to rebut his claim." *Witmer v. United States*, 348 U. S. 375 at page 381 (1955).

The investigative résumé indicates, among other things, that appellant drank to excess on several occasions. It indicates that on November 25, 1952 appellant was convicted of drunk driving in Santa Monica, California. It indicates that three former employers of appellant would not consider re-hiring him because he was considered "a smart aleck," he drank on the job, and he used rough language around customers. It further indicates that while attending the University of Kentucky appellant engaged in physical combat with another student and gave the boy quite a beating, in spite of the fact that the other boy was unwilling to fight. It is note-

worthy here that appellant indicated in his Special Form for Conscientious Objector filed on July 13, 1949, "Under no circumstances whatsoever do I believe in the use of force."

At page 12 in the brief for defendant-appellant, it is stated: "There is absolutely no evidence whatever in the Draft Board file that appellant was willing to do military service." This statement clearly represents appellant's misconception of the law. The burden was at all times on appellant to establish his exemption from military service. *Gaston v. United States*, 222 F. 2d 818 (C. A. 4, 1955). 32 C. F. R. 1622.1(c) states, in pertinent part, as follows: ". . . Each registrant will be considered as available for military service until his eligibility for deferment or exemption from military service is clearly established to the satisfaction of the Local Board." Appellee submits that the net result of the law as applied to the facts of appellant's case clearly establish that there was substantial basis in fact for the I-A Classification given appellant.

2. Appellant Was Not Denied Procedural Due Process Because of the Failure to Grant Him a Hearing Before a Department of Justice Hearing Office Prior to the Appeal Board Classification of September 23, 1955.

This issue was clearly presented to the Court below [Tr. p. 74, *et seq.*].

The facts here are not disputed that on May 4, 1955, appellant was classified I-A by Local Board No. 11, Newport, Kentucky, and that a valid appeal was taken from this classification. Appellant was, on September 23, 1955, classified I-A by the Appeal Board for the Eastern District

of Kentucky. Prior to this classification by the Appeal Board, appellant was given no hearing before a Department of Justice Hearing Office, nor was an investigation conducted by the Federal Bureau of Investigation. There had been, however, a classification of I-A arrived at on January 7, 1955, by the Appeal Board. Prior to this classification, appellant had been given a hearing before a Department of Justice Hearing Officer, and the Federal Bureau of Investigation had conducted an investigation. The question here presented is whether or not appellant was entitled to have his case again referred to the Department of Justice, and to have an additional investigation by the Federal Bureau of Investigation.

This Court has ruled on a similar point on two occasions. The point was first considered in the case of *Davidson v. United States*, 218 F. 2d 609 (9th Cir.) (certiorari granted and remanded to Circuit Court on other grounds on May 9, 1955, 348 U. S. 407), where there was a second appeal by the registrant following an initial appeal in which he was given an investigation and hearing by the Department of Justice. On the second "appeal" he was not given the hearing. The Court observed (at pp. 611-612):

"The record here discloses that after the registrant's appeal in 1950, no additional evidence was brought to the attention of the Local Board which would in any way affect his classification as I-A. The record reveals only that there was a postponement of his induction for the purpose of continuing his studies, and this postponement was cut short because of his failure to satisfactorily pursue his course of instruction as a fourth year university student majoring in Political Science. The record submitted to the Appeal Board contained nothing new which

could affect its prior decision. An alert Hearing Officer first saw the mistake and advised Davidson that he was not entitled to a second hearing because he had already had one . . . We are of the view that this conclusion was correct and it was not incumbent upon the Department to grant Davidson a hearing on this second occasion of his appearing before the Hearing Officer . . . to require appeal boards and the Department of Justice to consider and reconsider cases of this nature at the whim of the registrants would unnecessarily tend to confuse the Appellate procedures and would be violative of the system set forth with preciseness in paragraph 6(j)."

Whether or not a registrant is entitled to repetitious hearings was again discussed by this Court in the case of *Clark v. United States*, 236 F. 2d 13 (C. A. 9, 1956). The Court there stated at page 21:

"Even if it were held that his claim were within the definition, he still was not entitled to a second hearing and investigation, due to the fact that he had already had one hearing and had made no claim of change of belief since his first denial of conscientious objector status. A registrant is not entitled to repetitious determination of identical issues."

The Court further stated, at page 22:

"We find in the instant case no denial of due process because of the denial of the second hearing."

It is noteworthy that the Court in its opinion referred to two cases which had held it was error to deny a registrant an investigation and hearing. These cases are: *DeMoss v. United States*, 349 U. S. 918; and *Dates v. United States*, 348 U. S. 966. In both these cases the

Supreme Court in very brief *per curiam* opinions reversed the courts below because no hearing had ever been granted the registrant. In spite of these cases the court held there was no denial of due process where the registrant had had one hearing on his claim as a conscientious objector.

Appellant argues that there was new and additional evidence submitted to the Local Board after his hearing on August 17, 1954, which required that appellant be given another hearing on his last appeal. The only new evidence offered by appellant after his hearing on August 17, 1954, was a copy of his Jehovah's Witnesses' Identification Card, which he sent to Local Board No. 11 on May 11, 1955. This evidence in no way indicated any change of belief on the part of appellant, for appellant had indicated as early as July 13, 1949, in his Special Form for Conscientious Objector, that he was a member of Jehovah's Witnesses. Hence, the issues were identical and a further hearing would have been nothing more than "repetitious determinations of identical issues."

Appellant can show in no way that he was damaged or prejudiced by the failure to grant him an additional hearing. This Court has recognized that a registrant cannot complain where there is a failure to comply with statutory directive in the absence of being able to show prejudice. *Uffelman v. United States*, 230 F. 2d 297 (C. A. 9); *Kaline v. United States*, 235 F. 2d 54 (C. A. 9); *Frank v. United States*, 236 F. 2d 39 (C. A. 9); and *Clark v. United States* (*supra*).

Is it possible for appellant to show prejudice here? The recommendation of the Department of Justice sent to the Appeal Board for the Eastern District of Kentucky on December 6, 1954 (set out in Appendix A) indicates

that appellant appeared before the Hearing Officer accompanied by his father. The adverse information contained in the résumé of the FBI Investigative Report appears to have been fully discussed at the hearing, for appellant's statements with regard to the adverse information are set out. It is apparent from appellant's letter of August 15, 1955, to the Appeal Board for the Eastern District of Kentucky (set out in Appendix B) that appellant ably presented his side of the case for a I-O classification prior to the Appeal Board classification of September 23, 1955, the classification out of which the prosecution arose.

Would an additional appearance before a Hearing Officer have served any useful purpose? Appellant's appearance before a Hearing Officer was on August 17, 1954; his reply to the Appeal Board was almost one year later, on August 15, 1955. A comparison of appellant's statements made on the two occasions indicates that appellant was, on the latter occasion, still trying to explain the same adverse information that was before the Hearing Officer in 1954. This indicates that if there had been an additional hearing prior to the last Appeal Board classification, such a hearing would have resulted in nothing more than "repetitious determinations of identical issues."

Accordingly, appellee submits that appellant can show no prejudice or damage by the failure to grant him a second hearing, because the record clearly shows that he made no claim of change of belief or change in circumstances after his hearing, or prior to the time of the Appeal Board classification.

VI.

CONCLUSION.

For the above-stated reasons, appellee respectfully submits that the judgment should be affirmed.

Respectfully submitted,

LAUGHLIN E. WATERS,
United States Attorney,

LOUIS LEE ABBOTT,
*Assistant U. S. Attorney,
Chief, Criminal Division,*

JOHN K. DUNCAN,
*Assistant U. S. Attorney,
Attorneys for Appellee,
United States of America.*



EXHIBIT A.

DEPARTMENT OF JUSTICE
Washington, D. C.

Dec. 6, 1954

Chairman, Appeal Board, Eastern
District of Kentucky
Selective Service System
201 Switow Building
218 E. Main Street
Lexington, Kentucky

Re: James Caleb Sandner, Jr.
Conscientious Objector

Dear Sir:

As required by section 6 (j) of the Universal Military Training and Service Act, an inquiry was made in the above-mentioned case and an opportunity to be heard on his claim for exemption as a conscientious objector was given to the registrant by Honorable Louis J. Euler, Hearing Officer for the Southern District of California.

The registrant is twenty-three or twenty-four years of age, unmarried, and resides in Pacific Palisades, California. He is a member of Jehovah's Witnesses, of which his parents are also members. He attended the Newport (Kentucky) High School and the University of Kentucky but did not graduate from the latter institution. He claims exemption both from combatant and noncombatant service.

Attached hereto and made a part hereof is a résumé of the investigative report made in this matter.

The registrant personally appeared at a hearing in response to the notice mailed to him, accompanied by his

father. The registrant did not base his claim on the teachings or doctrines of the Jehovah's Witnesses, nor any other organization or denomination. He stated that his claim is founded upon his training and belief in the Bible which outlines that Jesus is the Commander of the Army and that he is a part of that army. He denied that he was a pacifist but he would only fight if God commanded him to fight. On the other hand, he also stated that he could not kill anyone and that when Christ was on earth He was not a warrior. Registrant's attention was called to SSS Form No. 150, filed July 18, 1949, in which he stated he would not use force under any circumstances and to a later SSS Form No. 150 in which he indicated that he would use force to defend himself, his loved ones and other members of Jehovah's Witnesses.

In regard to the résumé of the investigative report, the registrant admitted that he had been fined for disorderly conduct in Covington, Kentucky, that he was expelled from a dormitory at the University of Kentucky, that on occasions he had been drunk and had used rough language in altercations and that he had not attended meetings of the Jehovah's Witnesses regularly. He also admitted that he had been sentenced to ten days in jail in Santa Monica, California, for driving an automobile while drunk.

The Hearing Officer found that the registrant did not base his claim on the teachings of any organization but upon his own personal moral code, his own personal moral philosophy, and his own sociological views founded upon his interpretation of and conclusions from his study of the Bible. He concluded that his course of conduct clearly was not that of a religious person and that the registrant is inconsistent, insincere and does not make his claim in

good faith. Accordingly, the Hearing Officer recommends that the registrant's claim be not sustained.

After consideration of the entire file and record, the Department of Justice finds that the registrant's objections to combatant and noncombatant service are not sustained. It is, therefore, recommended to your board that the registrant's claim for exemption from both combatant and noncombatant training and service be not sustained.

The Selective Service Cover Sheet in the above case is returned herewith.

Sincerely,

T. OSCAR SMITH

T. Oscar Smith

Special Assistant to the Attorney General

EXHIBIT B.

August 15, 1955

Appeal Board, Eastern District
of Kentucky
Selective Service System
421 Federal Building
Lexington, Kentucky

Gentlemen:

In reply to the recommendation of the Department of Justice I take this opportunity to explain the facts regarding my claim of Conscientious Objector. The FBI investigative report used in forming these conclusions was completed some eighteen months ago and does not give a complete up to date résumé of my preaching activities and personal life.

The Hearing Officer stated that I did not base my claim on teachings or doctrine of the Jehovah's Witnesses nor any organization or denomination. I am a Jehovah's Witness as proved by evidence presented in my permanent file. It was either misunderstood or unknown to the Hearing Officer that Jehovah's Witnesses do not make or teach anyone not to become a member of the Armed Forces of any nation but do teach that true Jehovah's Witnesses can not become such members because they are already members of an Army led by Jesus Christ as outlined in the Holy Bible. I did deny being a pacifist and further explained my stand as a warrior for right and truth as set forth in the Bible and would fight just as Jehovah's faithful people did against enemies in Bible times. On SSS form #150 filed July 18, 1949 I was not familiar with this question and answered accordingly, but on a later form #150 I qualified my answer to show even though I am neutral toward worldly conflicts

I am not a pacifist and would use force to defend my loved ones, other members of Jehovah's Witnesses and myself.

I was fined for disorderly conduct in Covington, Kentucky as a result of having the auto I drove to work and school towed away and impounded for overtime parking, in an attempt to find it and pay charges against it, I was arrested for not leaving the police station without my auto and walking some ten miles home until they told me where the auto was and I could claim it at some later date. I was expelled from the dormitory at the University of Kentucky over an argument with the director of the dormitories for not playing intramural sports on the dormitory teams because my studies and part time job took all of my free time. It is the rule of the University that any freshman expelled from the dormitories is also expelled from the University, however, my particular case was a personality clash and when brought to the attention of the Dean of Men, it was decided I had really done nothing wrong but left in order to avoid any further situations. Being a young man and away from my home and parental guidance for the first time in my life I did drink alcoholic beverages and learned their effects. I had one altercation with another student at the University who had insulted a young lady in my presence. While attending college I worked at various part time jobs to help pay my way, that along with my study hours hardly allowed time to attend all of the meetings of Jehovah's Witnesses which were held some distance from my room, however, during summer months I did attend regularly at the Covington, Kentucky congregation of Jehovah's Witnesses. I was sentenced to ten days in jail for driving an automobile while drunk in Santa Monica, California but since I was unfamiliar with California laws

I was excused from serving this when it was explained to the local judge my mistake during the session of court. Records will bear this out.

The Hearing Officer stated I did not base my claim on the teachings of any organization but upon my own personal moral code, philosophy, conclusions and study of the Bible. I do have a moral code, philosophy and have studied and made conclusions from the Holy Bible, these all conform with the teachings of Jehovah's Witnesses. But this organization does not make or teach anyone not to become a member of the Armed Forces. As told to the Hearing Officer, any member of the Armed Forces could become a Jehovah's Witness, but no true Jehovah's Witness could become a member of the Armed Forces.

The Hearing Officer concluded my course of conduct was not that of a religious person that I was inconsistent, insincere and did not make my claim in good faith but he had judged me without offering me an opportunity to identify and hear those who offered information either because of evil motive, lack of knowledge or other grounds. I demand a copy of the FBI report so I might answer these informants thereby protect myself and my rights under the law. The Hearing officer relied on the evidence supplied by informants which I challenge and until now have no way of saying whether I know these informants or facts stated against me. It is necessary for me to have the names and addresses of these informants which I will learn when I read this report in order to protect myself.

I did make a change in SSS form #150, as I studied the Bible more thoroughly, but I hardly feel this makes me inconsistent. If I were insincere, I would have been in and out of the Armed Forces long ago but I have re-

mained consistent even facing fine and imprisonment once for refusing to be inducted into the Armed Forces. If insincere I would never had done this. Before this Selective Service Act went into effect, I requested and was granted exemption from Military Science at the University of Kentucky based on my claim of being a Conscientious Objector. This could hardly be deemed inconsistent. I have been conducting a weekly Bible study teaching Bible facts with the help of accepted literature of Jehovah's Witnesses for over two years and regularly attend meetings and assemblies of Jehovah's Witnesses and also participate in door to door preaching work.

The recommendation I am answering is based on this secret FBI investigative report and this is not even included in my file. I request this report to be included in my file so that additional favorable evidence in it may be considered by your board. I feel that I will be tried behind my back and denied a fair hearing unless I am supplied with the secret FBI investigative report. It was definitely used in making the recommendation and this recommendation is based upon the secret investigative report, but I was not given a copy of it and the meager summary of it supplied me and included in my file is entirely inadequate to enable me to protect my rights and defend myself before the appeal board.

Please do not take any further action in my case unless and until the FBI report is supplied to me and I have an opportunity to consider it and answer it before your board reached its final decision.

Sincerely,

JAMES CALEB SANDNER JR.

James Caleb Sandner Jr.

SS No. 15-11-30-218



No. 15465

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JAMES CALEB SANDNER, JR.,

Defendant-Appellant,

vs.

UNITED STATES OF AMERICA,

Plaintiff-Appellee.

REPLY BRIEF OF APPELLANT.

EDGAR G. WENZLAFF,

417 South Hill Street,

Los Angeles 13, California,

Attorney for Defendant-Appellant.

FILED

JUN 8 1957

PAUL P. O'BRIEN, CLERK



TOPICAL INDEX

PAGE

I.

Was the denial of the full conscientious objector status by the Selective Service Appeal Board to appellant without basis in fact, arbitrary and capricious?.....	1
---	---

II.

Was appellant illegally denied his right to an investigation, a hearing, a report by a hearing officer and a recommendation by the Department of Justice to the Board of Appeal upon the conscientious objector claim contrary to Section 6(j) of the Act and Section 1626.25 of the Regulations on his third ap- peal?	3
--	---

TABLE OF AUTHORITIES CITED

CASES	PAGE
Blevins v. United States, 217 F. 2d 506.....	10
Chernekov, William, Jr. v. United States, 219 F. 2d 721.....	2
Clark v. United States, 236 F. 2d 13.....	3
Davidson v. United States, 218 F. 2d 609.....	3
Hull v. Stalter, 151 F. 2d 633.....	8
Rempel v. United States, 220 F. 2d 949.....	2
Roberson v. United States, 208 F. 2d 166.....	8, 9
United States v. Donald Glen Thomas, 139 Fed. Supp. 427....	6, 9
United States v. Donald Oscar Krueger, 143 Fed. Supp. 65.....	9

No. 15465
IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

JAMES CALEB SANDNER, JR.,

Defendant-Appellant,

vs.

UNITED STATES OF AMERICA,

Plaintiff-Appellee.

REPLY BRIEF OF APPELLANT.

I.

Was the Denial of the Full Conscientious Objector Status by the Selective Service Appeal Board to Appellant Without Basis in Fact, Arbitrary and Capricious?

An examination of the Investigative résumé of the F.B.I. investigation of September 9, 1953, indicates that on November 25, 1952, appellant was convicted of drunk driving. This is the last date of any of appellant's alleged misconduct. His other so called acts of misconduct which are to indicate appellant's objective state of mind occurred before about March 27, 1951 the date of the first hearing of appellant by a hearing officer whose report was based upon the F.B.I. report which alleged even before that date of March 27, 1951, appellant had worked for a brewery, drank beer, was wild, got into a fist fight, and was

desirous of studying law. These alleged acts occurred before March 27, 1951 and September 18, 1948, and possibly before that time, while appellant was still a boy. See Statement of Facts—Opening Brief.

Appellant's last act of alleged misconduct on which we are to base his objective state of mind (according to appellee's contention) happened November 25, 1952 when he was convicted of drunk driving in Santa Monica, California. Only one conviction for drunkenness is recorded against appellant. See cases *William Chernekoff, Jr. v. United States of America*, 219 F. 2d 721 (9th Cir.), February 24, 1955, and *Rempel v. United States of America*, 220 F. 2d 949 (10th Cir.), 1955, which hold one conviction of drunkenness insufficient to show insincerity of appellant. The other old incidents held against appellant during his boyhood are minor, such as working for a brewery, being wild, being a smart aleck, a fist fight with another boy, using rough language and aspiring to be a lawyer, could not be sufficient to show an objective state of mind to find appellant guilty of a felony.

The Government is silent as to appellant's record of conduct between December 6, 1954 and September 28, 1955, the last time appellant was classified 1-A by the Appeal Board, a period of time about a year and nine months. There was a change in appellant's conduct between those dates to show his objective state of mind more fully. See pages 7 and 8 of Appellant's Opening Brief.

Also appellant produced evidence that he had repented and became a member of his religious congregation in good standing. See pages 17 and 18 of Appellant's Opening Brief.

II.

Was Appellant Illegally Denied His Right to an Investigation, a Hearing, a Report by a Hearing Officer and a Recommendation by the Department of Justice to the Board of Appeal Upon the Conscientious Objector Claim Contrary to Section 6 (j) of the Act and Section 1626.25 of the Regulations on His Third Appeal?

The Government leans heavily upon the cases of *Davidson v. United States*, 218 F. 2d 609 (9th Cir.) 1954, and *Clark v. United States*, 236 F. 2d 13 (C. A. 9, 1956), which hold where there is no additional evidence or no claim made of change of belief, appellant would not be entitled to a second hearing by the Department of Justice and investigation by the F.B.I. The new evidence presented by appellant to Local Board after his hearing of August 17, 1954 was a copy of his Congregation's identification card or certificate which shows he was now a member of the congregation in good standing, a very important and significant credential showing a change in appellant's conduct, that he is now a good, regular member of the congregation. This certificate was sent to Local Board No. 77, Covington, Kentucky, on May 11, 1955. In the *Davidson* and *Clark* cases, *supra*, there was no showing of any new evidence or change of circumstances. In the instant case we definitely show additional new evidence and change of circumstances. The appellant was entitled to a third investigation which was denied appellant from the time of his second appeal to his third appeal, a period of one year and nine months, which time would justify a third investigation, and enable appellant to show a sufficient change in circumstances. The Government argues that there was no basis in fact for the denial of the conscientious objector status based on his prior

misconduct. Since the prior misconduct may be considered by the Court as a basis of fact for the lack of sincerity, then it is absolutely essential that the Court hold that there must be another investigation based on the change of conduct and circumstances of appellant, a change of conduct and circumstances being that since the last investigation by Hearing Officer and F.B.I., appellant has married, settled down, has a child, works steadily, attends church regularly and has a certificate from his Congregation Head that he is in good standing as a Jehovah Witness. See pages 17 and 18 of Appellant's Opening Brief.

"The case of *United States of America v. Donald Oscar Krueger*, 143 F. Sup. 65, Eastern District of Wisconsin, United States District Court, holds 'No decision that the Court has been able to find since the *Dickinson* case modifies the holding of the majority of the Court as therein set forth, namely, that there must be some basis in fact for the classification given the registrant. In the case of *Gonzales v. United States*, 348 U. S. 407, there were things in the record which cast some doubt as to the registrant's claim to being a conscientious objector and as to whether that claim was asserted in good faith or whether it had been asserted too recently and too closely relating to his draft status to warrant acceptance of his conscientious objector position as genuine. The Supreme Court reversed the Court of Appeals and held that under the overall procedures designed to be 'fair and just,' the registrant was entitled to receive a copy of the Justice Department's recommendation and be given reasonable opportunity to file a reply thereto. Nothing in that decision modifies the holding in the *Dickinson* case.

"The Court is of the opinion that, at least as of April 29, 1952, the record is such that the board could well believe there was some proof that is in-

compatible with the defendant's claim for conscientious objector status, and that this evidence and the record up to that date were such that it cannot be said that the refusal to grant conscientious objector classification at that time was based solely on suspicion and speculation.

"The question then arises whether anything that occurred after that time changed the situation.

"The registrant's letter of March 27, 1953 indicates that at that time he claims to be active in preaching from house to house and on the street. On May 1, 1953 registrant states, 'I am one of Jehovah's Witnesses.' There could have been a change in the situation between April 29, 1952 and May 1, 1953. When the matter was referred to the Appeal Board on May 7, 1953, the Appeal Board apparently did not refer the file to the Department of Justice for a second time. The law requires that on appeal from the refusal of conscientious objector status the Appeal Board shall refer the matter to the Department of Justice. Failure to do so under the decisions results in failure to grant the registrant the rights to which he is absolutely entitled. The Department of Justice, had it made an up-to-date investigation, might have found that the registrant's situation had changed. The Court believes that the registrant was entitled to such reference and to such advice. The file indicates that registrant claims that he was continuing his bible study and had become a member of Jehovah's Witnesses. For that reason the Court does not feel that the case of *Davidson v. United States*, 218 F. 2d 609, is controlling.

"Feeling that the defendant was denied a right to which he is entitled, namely, a second review by the Department of Justice, in view of the lapse of time and circumstances, and its advice and recommendation, it is the opinion of the Court that the defendant

has been denied this right and therefore, and for that reason, it is the verdict and judgment of the Court that the defendant is not guilty.”

Also see case, *United States v. Donald Glen Thomas*, United States District Court, Eastern District of Wisconsin (March 19, 1956), 139 Fed. Supp. 427, page 4, which holds:

“The statutory requirement is clear and mandatory. The statute applicable reads in part:

“‘Any person claiming exemption from combatant training and service because of such (that is, as previously defined) conscientious objection *shall*, if such claim is not sustained by the local board, be entitled to an appeal to the appropriate appeal board. Upon the filing of such appeal, the appeal board *shall* refer any such claim to the Department of Justice for inquiry and hearing. The Department of Justice, after appropriate inquiry, *shall* hold a hearing with respect to the character and good faith of the objections of the person concerned, and such person *shall* be notified of the time and place of such hearing.’ Title 50, App. Sec. 456 (j). (Emphasis supplied.)

“The Justice Department ‘inquiry and hearing’ actually amounts to an F.B.I. investigation and an interview by a hearing officer with the registrant. Among the things to be determined by the Department of Justice is ‘character and good faith of the objections of the person concerned.’ This provision specifically precludes the Justice Department from refusing jurisdiction of the registrant’s claim on precisely the conclusion that the hearing is designed to establish. The Department of Justice in this whole proceeding occupies a position very much like a fact-finding body with no discretion to accept or to disallow claims submitted to it for investigation. The Justice Department makes no determination other

than to submit a recommendation to the appeal board. It is this board that determines a classification which the courts may not overturn if there is a basis in fact. *Gonzales v. United States*, 348 U. S. 407 (1955). The *Davidson* case which supported the United States Attorney's summary disposition of a referred claim without hearing is upon the ground that the claim presents no new facts that were not already investigated at a prior hearing.

"Under the present statute at the stage of the proceedings where the claim has been referred to the Justice Department, no exercise of discretion may be exercised by that Department to refuse jurisdiction where no hearing has yet been had on the claim, the registrant's own statement notwithstanding. It is only after the first claim has been denied that substantially similar claims may be rejected, and then it is the court's place to uphold the Department of Justice's action on the ground that the registrant is not prejudiced in being denied a hearing that he has had once and from which the Department's recommendation was made and was factually supported.

"The Selective Service Act and accompanying regulations are not without their complications for even judicial interpretation. To a very greater extent must the registrant find himself at a loss to understand his rights and the procedures available to him despite the presumption that he is aware of the law. Where the law is clear and mandatory in requiring a procedure for the benefit of the registrant, it must be followed.

"If Congress had intended that discretion should rest with the Department of Justice to refuse a hearing, it could have employed different language such as in cases 'where doubt exists' or 'in cases where a substantial factual controversy exists.' It could have used the word 'may' instead of 'shall.'

“Congress may well have considered that these young men subject to the selective service law are usually not familiar with the law and the many regulations under it. It may well have made the hearing by the Department of Justice mandatory with the idea in mind that the registrant should have that additional opportunity to advance anything that he overlooked advancing previously in answer to his questionnaire. For all of which foregoing reasons the Court must reject the government’s contention and find in favor of the defendant. It is the Court’s finding that the defendant is not guilty of the crime charged in the Indictment.”

Hull v. Stalter, 151 F. 2d 633, 7th Cir. (1945), at page 635. This case lays down the rule that a registrant should be classified according to his status at the time of current classification and not at the time of a prior classification.

Assuming that the Court will hold that the second reference of December 6, 1954, is adequate and sufficient. It may be that Sandner did not make his change from his past misconduct until after this date. Since the Court may hold that past activity inconsistent with the claim may be sufficient to defeat the exemption (*Roberson v. United States*, 208 F. 2d 166, 10th Cir. (1953), and inasmuch as the Department of Justice investigation is primarily for the benefit of the registrant there is an absolute necessity for a third reference to the Department of Justice.

There is not much doubt that new and additional evidence could be developed to show a more complete change of status if an investigation and hearing by hearing officer were had on the appellant’s third hearing. There was a period of time over one year and three months to show

a change of circumstances. The whole theory of Christianity is that even a sinner can repent from his way. Once a lost sheep has repented he is restored to the fold and the rejoicing is greater in the congregation than when a new sheep is brought into the fold. For this reason the ruling in the *Roberson v. United States, supra*, is erroneous because of this doctrine of repentance.

If the Court in the case at bar concludes on any grounds that there was a basis in fact for the denial of the conscientious objector status, then because the lapse of time and the change in the course of conduct, there should be a third referral as was held in the Wisconsin cases of *Krueger* and *Thomas, supra*.

In the entire Registrant's file and his SSS 150 application form, appellant claims he is a Jehovah Witness and has preached from door to door. He informs the Appeal Board in a letter dated August 15, 1956, shown as Government's Exhibit "B" and included in their reply brief, that he is a Jehovah Witness and states that his moral code and philosophy conform with the teachings of Jehovah's Witnesses.

The letter of December 6, 1954 from the Justice Department shown as Exhibit "A" by Government that the Appellant did not base his claim on the teachings of any organization but upon his own moral code, philosophy and his own sociological views founded upon his interpretation of and conclusions from his study of the Bible. The entire record and file shows this to be a misstatement by the Justice Department's Hearing Officer.

The second hearing is absolutely defective because it is based on the erroneous conclusion that the registrant has a personal moral code and not religious training and belief for his conscientious objections. This conclusion

of the hearing officer, relied upon in the second recommendation of the Department of Justice, is of itself alone sufficient basis for a new Department of Justice hearing.

The court so held in *Blevins v. United States*, 217 F. 2d 506, 9th Cir. (1954), as follows:

“This action of the appeal board was predicated in part upon that board’s finding in concurrence with the local board that registrant’s views were essentially philosophic and merely a personal moral code and not a religious belief. It is sufficient to say that there is no basis in the record for any such conclusion since both the local board and the appeal board based their classifications solely upon the written record and the statements and disclosures made by the registrant show beyond controversy that his claim of conscientious objection were based upon his Bible study and his belief in God. The appeal board also predicated this conclusion upon registrant’s statement that he believed in self defense. This, again, furnishes no basis for a denial of conscientious objection as we have held in *Hinkle v. United States*, 216 F. 2d 8 (No. 14,163 decided September 24, 1954).

“Furthermore, under the rule stated in the case of *Sterrett v. United States*, supra, and *Triff v. United States* (No. 13952, decided with *Sterrett v. United States*), registrant was refused the hearing by the Department of Justice which the statute required. Upon the authority of these two cases the judgment here cannot stand.

“Reversed.”

Dated June 7, 1957.

Respectfully submitted,

EDGAR G. WENZLAFF,

Attorney for Defendant-Appellant.

No. 15467

United States
Court of Appeals
for the Ninth Circuit

RICHMOND INVESTMENT COMPANY,
IRENE RUTH WOODS, MINTZER ES-
TATE COMPANY, MARIN LUMBER &
SUPPLY CO., and EVA OCKENDEN,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

Appeal from the United States District Court for the
Northern District of California,
Southern Division.

FILE

APR 25 19

PAUL P. O'BRIEN



No. 15467

United States
Court of Appeals
for the Ninth Circuit

RICHMOND INVESTMENT COMPANY,
IRENE RUTH WOODS, MINTZER ES-
TATE COMPANY, MARIN LUMBER &
SUPPLY CO., and EVA OCKENDEN,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

Appeal from the United States District Court for the
Northern District of California,
Southern Division.

21th

Journal of the
Royal Society of
Medicine

Vol. 100, No. 1, 2007

ISSN 0959-6288

Printed in the United Kingdom
All rights reserved

INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

PAGE

Answer of Certain Defendants.....	7
Answer of Eva A. Ockenden.....	10
Certificate of Clerk.....	32
Complaint	3
Counsel, Names and Addresses of.....	1
Findings of Fact and Conclusions of Law.....	22
Judgment	27
Memorandum and Order.....	21
Motions Submitted to Court in Course of Trial	15
Notice of Appeal.....	29
Statement of Points.....	30
Stipulation of Parties Re Trial.....	13

NAMES AND ADDRESSES OF COUNSEL

DONOVAN O. PETERS,
SHERMAN, PETERS, ELLIOTT & HUTCHINS,
2100 Mills Tower,
San Francisco 4, California,
Attorneys for Appellants.

LLOYD H. BURKE,
United States Attorney;

J. HAROLD WEISE,
Assistant United States Attorney,
Post Office Building,
San Francisco 1, California,

PERRY W. MORTON,
Assistant U. S. Attorney General,
Washington 25, D. C.,
For Appellee.



In the District Court of the United States, in and
for the Northern District of California, South-
ern Division

No. 22417-W

UNITED STATES OF AMERICA,

Plaintiff,

vs.

Certain Parcels of Land in the City of Richmond,
County of Contra Costa, State of California,
MINTAXER ESTATE, EMMA J. MALONE,
FLORENCE L. TAYLOR, J. A. BANZHOF,
RICHARD O'FARRELL, JAS. P. Mc-
AULIFFE, DELLA BINGHAM, IRENE
RUTH WOODS, MARINE LUMBER &
SUPPLY CO., EVA A. ACKENDEN, C.
BAUTI, CITY OF RICHMOND, COUNTY
OF CONTRA COSTA, STATE OF CALI-
FORNIA,

Defendants.

COMPLAINT IN CONDEMNATION

Comes now the Plaintiff, United States of Amer-
ica, by M. Mitchell Bourquin, Special Assistant to
the Attorney General, at the direction and under
the authority of the Attorney General of the United
States, and pursuant to the request of the Acting
Commissioner of the Federal Public Housing
Authority of the United States, and for cause of
action against the above-named defendants, alleges
as follows:

I.

That this proceeding is instituted and the lands hereinafter described are taken and condemned pursuant to and under the provisions and authority of and for the purposes and uses authorized by the Act of August 1, 1888, 25 Stat. 357 (U.S.C. Title 40, Sec. 257); the Act of February 26, 1931, 46 Stat. 1421 (U.S.C. Title 40, Secs. 258 (a) to 258 (e)); the Act of October 14, 1940 (Public No. 849, 76th Congress), as amended and Executive Order No. 9070, dated February 24, 1942, the Second War Powers Act (Public Law No. 507, 77th Congress), and Executive Order No. 9150, dated April 28, 1942, funds having been appropriated by the Act of October 14, 1940 (Public Resolution 106, 76th Congress) and Acts supplementary thereto and amendatory thereof.

II.

That the estate or interest which Plaintiff seeks to take and condemn is the full fee simple title in and to the lands hereinafter described, subject to utility easements, if any.

III.

That the lands hereinafter described have been selected by the Acting Commissioner of the Federal Public Housing Authority of the United States for use in connection with defense housing, Richmond, California, and are sought to be taken and condemned for said purpose and use and are suitable and necessary therefor. That said use of said lands constitutes a public use, and said lands

are required for immediate use in order to carry out said purpose.

IV.

That the acquisition of said lands by Plaintiff will be of the greatest public benefit and the least private injury; that no part of said lands has heretofore been appropriated for public use by plaintiff or the State of California, or any political subdivision thereof.

V.

That there are sufficient funds now available with which plaintiff can and is authorized to pay just compensation for the lands sought to be taken and condemned herein in whatever sum may be ultimately awarded in this proceeding for the taking of said lands and any damages resulting therefrom.

VI.

That Plaintiff is informed and believes, and therefore alleges that the lands taken by this proceeding are not a part of any larger tract belonging to the apparent or purported owners of said land above described.

That the Defendants, First Doe to Tenth Doe, inclusive, and First Doe Corporation to Tenth Doe Corporation, inclusive, are sued and designated herein by fictitious names for the reason that their true names are unknown to Plaintiff, but the Plaintiff will, upon ascertaining their true names, substitute the same for such fictitious names by appropriate amendment, and prays such leave of the Court; that said defendants, and each of them, may

have or claim to have an interest in some piece or parcel of the lands sought to be taken and condemned in this action, but that the nature, character or extent of such interest is unknown to Plaintiff.

VIII.

That the apparent and purported owners of the property are as follows:

Parcel No.	Owner
1	Mintaxer Estate
2	Emma J. Malone
3	Florence E. Taylor
4	J. A. Banzhof
5	Richard O'Farrell
6	Jas. P. McAuliffe
7	Della Bingham
8	J. A. Banzhof
9	Irene Ruth Woods
10	J. A. Banzhof
11	Marine Lumber & Supply Co.
12	Eva A. Ackenden
13	Irene R. Woods
14	C. Bauti

That the City of Richmond and County of Contra Costa and the State of California may have or claim some interest in the above described property and are therefore joined as Defendants.

IX.

That the land to be taken and condemned in this proceeding is described as follows:

Wherefore, Plaintiff prays judgment:

1. (a) Decreeing that said lands above described, to the extent of the title and interest which Plaintiff seeks to acquire, are condemned for necessary public uses of the plaintiff, as authorized by law; that all of said lands are necessary and suitable thereto.

(b) Determining the value of the lands subject of this action, and each separate interest therein, and directing the payment for each separate interest to the persons entitled thereto.

2. For such other and further relief as the Court shall deem meet and proper in the premises.

/s/ M. MITCHELL BOURQUIN,
Special Assistant to the Attorney General, At-
torney for Plaintiff.

Duly verified.

[Endorsed]: Filed December 29, 1942.

[Title of District Court and Cause.]

ANSWER OF CERTAIN DEFENDANTS

Now come the defendants named herein below and answering the complaint of the plaintiff herein, admit, deny and allege as follows:

1. These answering defendants allege that their respective properties are described and that the values thereof are as follows:

Name of Defendant Owner	Parcel No.	Lot No.	Block No.	Defendant's Valuation
Mintaxer Estate	1	4	27	\$ 400.00
Emma J. Malone	2	5	27	300.00
Florence E. Taylor	3	6	27	300.00
Richard O'Farrell	5	1	11	400.00
Jas. P. McAuliffe	6	2 to 8, inc.	11	2,200.00
Della Bingham	7	9 and 10	11	600.00
A. Hinchman, as interest may appear.....		(above numbered lots and blocks)		(as stated above)
J. A. Banzhof	4	7 plus (Res.)	27	1,300.00
Irene Ruth Woods	8	11 to 23, inc.	11	7,800.00
J. A. Banzhof	9	26 to 34, inc.	11	2,700.00
Marin Lumber & Supply Co.	11	24 and 25	11	2,000.00
Irene R. Woods	13	1, 2, 7 to 14, inc.	12	3,100.00
		21 to 31, inc., plus (Res.)	12	4,700.00
		15 and E. 6 ft. of 16	12	900.00
		18 and 19	12	1,400.00
			12	1,800.00

2. Admit the allegations contained in paragraphs I, II, III and V of plaintiff's complaint herein, excepting that these defendants allege that the said use of said lands to meet the lawful and proper needs of the plaintiff does not require the fee title of said lands but these defendants allege that leaseholds for the duration of the present war and emergency needs would be and are adequate, proper and reasonable for the plaintiff to take in the herein action for the public use and to carry out the alleged purposes of the plaintiff.

3. Admit the allegations in paragraph IV of plaintiff's complaint, excepting that these defendants deny that the acquisition of said lands and the fee title thereto by the plaintiff will cause or be of the least private injury, and these defendants allege that leaseholds as above alleged or fee title reserving the right of these defendants to have the said lands restored to them respectively upon the expiration of the public and plaintiff's need thereof upon reasonable repayment of any compensation allowed and paid to these defendants herein and reasonable adjustment of equities between the parties as of the time of such restoration; that these defendants are entitled to reasonable priority of reacquiring their said lands upon the termination of the plaintiff's and public need therefor.

4. Admit the allegations in paragraph VIII of plaintiff's complaint excepting as alleged in paragraph 1 of the herein answer.

Wherefore, these defendants pray judgment determining the reasonable and fair market value of their said lands, respectively, as of the date on which the said lands were taken by the plaintiff herein, and for the payment to these defendants of the said reasonable and fair values so determined as compensation to these defendants, respectively, and for such other and further relief as the Court shall deem meet and proper in the premises.

SHERMAN & PETERS,

Attorneys for Said

Defendants.

Duly verified.

To the Plaintiff above named :

You Will Please Hereby Take Notice that these answering defendants demand a jury trial in the above-entitled action.

SHERMAN & PETERS,

Attorneys for These Answer-
ing Defendants.

Receipt of Copy acknowledged.

[Endorsed]: Filed February 27, 1943.

[Title of District Court and Cause.]

ANSWER OF EVA A. OCKENDEN

Now comes the defendant Eva A. Ockenden named herein below and aswering the complaint of the plaintiff herein, admits, denies and alleges as follows:

1. This answering defendant alleges that her respective properties are described and that the values thereof are as follows:

Name of Defendant Owner: Eva A. Ockenden.
Parcel No.: 12.

Lot No.: 17 and Westerly 19 feet of Lot 16.

Block No.: 12.

Defendant's Valuation: \$1,600.00.

2. Admits the allegations contained in paragraphs I, II, III and V of plaintiff's complaint herein, excepting that this defendant alleges that the said use of said lands to meet the lawful and proper needs of the plaintiff does not require the fee title of said lands, but this defendant alleges that leaseholds for the duration of the present war and emergency needs would be and are adequate, proper and reasonable for the plaintiff to take in the herein action for the public use and to carry out the alleged purposes of the plaintiff.

3. Admits the allegations in paragraph IV of plaintiff's complaint, excepting that this defendant denies that the acquisition of said lands and the fee title thereto by the plaintiff will cause or be of the least private injury, and this defendant alleges that leaseholds as above alleged or fee title reserving the right of this defendant to have the said lands restored to her upon the expiration of the public and plaintiff's need thereof, upon reasonable repayment of any compensation allowed and paid to this defendant herein and reasonable adjustment of equities between the parties as of the time of

such restoration; that this defendant is entitled to reasonable priority of reacquiring her said lands upon the termination of the plaintiff's and public need therefor.

4. Admits the allegations in paragraph VIII of plaintiff's complaint excepting as alleged in paragraph 1 of the herein answer.

Wherefore, this defendant prays judgment determining the reasonable and fair market value of her said lands as of the date on which the said lands were taken by the plaintiff herein, and for the payment to this defendant of the said reasonable and fair values so determined as compensation to this defendant, and for such other and further relief as the Court shall deem meet and proper in the premises.

SHERMAN & PETERS,
Attorneys for Said
Defendants.

Duly verified.

To the Plaintiff above named:

You Will Please Hereby Take Notice that this answering defendant demands a jury trial in the above-entitled action.

SHERMAN & PETERS,
Attorneys for Defendant Eva
Receipt of Copy acknowledged.
A. Ockenden.

[Endorsed]: Filed June 24, 1943.

[Title of District Court and Cause.]

STIPULATION

It is hereby stipulated by and between the United States of America, hereinafter referred to as First Party, and certain defendants, represented by Sherman, Peters, Elliott & Hutchins, hereinafter referred to as Second Parties, as follows:

I.

That the above-captioned action is one to take the fee simple title to the land more specifically described in the complaint on file herein.

II.

That for the purpose of classifying the subject property as to value and to fix the fair compensation therefor, it is agreed that the full compensation for the taking of the fee simple title thereto if final judgment herein determines that the taking of fee title was proper, authorized and lawful, shall be as follows:

Corner lots on Cutting Boulevard at \$400.00 each.

Inside lots on Cutting Boulevard at \$300.00 each.

Corner lots on streets other than Cutting at \$200.00 each.

Inside lots at \$100.00 each.

III.

That there shall be reserved for determination as a matter of law by the Court all other issues of law

and fact, sitting without a jury, with every reasonable effort to shorten the time of trial to the issues relating to the legality and authority of the plaintiff to take, and for the purposes and uses all as more fully alleged in the complaint on file herein, the fee simple title to the subject property, and the parties hereto may by motion or responsive pleading present such issues for determination by the Court.

IV.

In the event the order or judgment of the Court shall be entered for the plaintiff, and become final, it is understood and agreed that from said sums agreed to be full compensation as set forth in paragraph II above, there shall first be paid from said compensation all taxes, liens, bonds, assessments or other claims as and when approved by the Court in and to the land the subject of this action as and to the persons and in the amounts determined by the Court.

In Witness Whereof the parties hereto have hereunto set their hands this 10th day of August, 1956.

UNITED STATES OF AMERICA,

By /s/ J. HAROLD WEISE,
Assistant United States Attorney, Attorney for
Plaintiff.

SHERMAN, PETERS,
ELLIOTT & HUTCHINS,

By /s/ DONOVAN O. PETERS.

[Endorsed]: Filed August 31, 1956.

[Title of District Court and Cause.]

MOTIONS SUBMITTED TO COURT
IN COURSE OF TRIAL

Motions for judgment for the defendants on each or all of the following grounds:

1. On the pleadings that the complaint herein fails to allege facts sufficient to state a cause of action for taking full fee title for the temporary use authorized in the Lanham Act.

2. That the taking of the fee title was an excessive taking of interest in lands beyond the quantum necessary for the temporary housing use for which it was condemned.

3. That the plaintiff has failed to prove a cause of action for the condemnation of fee title.

4. That the funds on deposit in this court are limited to payment for the temporary use of the lands taken.

5. That the interest taken in condemnation is a temporary interest which may be described as a terminable fee which terminated upon the completion or termination of the temporary use of temporary housing as specifically described in the Lanham Act.

6. That the taking of the fee title to the lands of these defendants is void to the extent of the excess interest beyond the quantum necessary for the temporary housing use for which it was taken and as expressly defined in the Lanham Act.

7. That the disposal or use of the lands of defendants herein other than for defense housing as authorized in the Lanham Act of the time of taking said lands in those condemnation proceedings, be restrained and enjoined.

Summary in Part Supporting Motions for Judgment

The statutory authorization by Congress, relied upon herein are contained in the Lanham Act (the Act of October 14, 1940, Public No. 849, 76th Congress; 54 Stat. 1125, 42 U.S.C.A. Secs. 1521, et seq.) as follows:

“Sec. 1521 (title 42) Federal Works Administrator’s Powers Respecting Defense Housing.

“In order to provide housing for persons engaged in national-defense activities, and their families, and living quarters for single persons so engaged, in those areas or localities in which the President shall find that an acute shortage of housing exists or impends which would impede national-defense activities and that such housing would not be provided by private capital when needed, the Federal Works Administrator (hereinafter referred to as the ‘Administrator’) is authorized:

“(a) To acquire prior to the approval of title by the Attorney General (without regard to section 1339 of Title 10 and section 5 of Title 41), improved or unimproved lands or

interest in lands by purchase, donation, exchange, lease (without regard to sections 40a and 34 of Title 40, or any time limit on the availability of funds for the payment of rent), or condemnation (including proceedings under sections 257, 258, 361-368, and 248a-258e of Title 40).”

It is respectfully submitted by defendants that in support of their petition herein, their motions should properly be granted for the protection of the rights of private owners of property, assured to them under the Constitution of the United States, by which Congress is empowered to authorize only such minimum exercise of the power of eminent domain as a specified nationally vital use might justify. In order to avoid and prevent any abuse of such a vital power by administrative agencies to which it might be delegated, every effort by both Congress and the Judiciary is deemed proper and urgent to see that such power is exercised only for the taking of such minimum quantum of interest in property from private owners as will meet the particular Government use or purpose—i.e., a temporary interest in property for a temporary use.

Authority to “Acquire” Fee Title by Purchase Differs From Authority to “Acquire by Condemnation”

A general survey of the position taken by the Housing Administrator in his interpretation of his powers under the Lanham Act to “acquire” land

or interests in lands for temporary defense housing "by purchase * * * or condemnation," reveals the mistaken theory of the Administrator in the herein condemnation proceedings.

For the sake of illustration and argument, if we assume that the Administrator had attempted to "acquire" by purchase, lease, exchange or donation, the fee title of lands for defense housing, it is clear that in doing so he would not have filed the herein proceedings to exercise the extraordinary governmental power of eminent domain in his acquisition of such lands. In such voluntary sale and purchase the common law rights of private ownership of property would not be invaded.

But, on the other hand, it is an entirely different procedure when he employs force and seeks to act under the authority of the Lanham Act "to acquire" lands or interests in lands "by condemnation." Such acquisition by the Administrator is controlled by well established rules of strict construction of laws governing the exercise of the extraordinary power of eminent domain. If the Administrator seeks to "acquire" by condemnation, he seeks to wield a governmental power in derogation of the common law rights of private ownership of property. Even if Congress went so far as to permit the Housing Administrator "to acquire" by ordinary purchase, the fee title absolute of lands under the Lanham Act merely for temporary defense housing, if he believes it "in the best interests of the government" to meet future housing needs of a

community, nevertheless, the instant that the Administrator steps beyond an ordinary civil purchase acquisition and seeks to acquire "by condemnation" he is acting under entirely different rules of law.

If he does not acquire by ordinary bargain and sale transaction but assumes a power to take in eminent domain, and to invade the common law rights of private property, he cannot take in that manner one iota beyond the strict purpose for which the property is authorized to be condemned under the strict interpretation of the Lanham Act. The authority to "acquire" fee title by purchase obviously differs from the authority to "acquire" by condemnation. Rules of strict construction of statutes authorizing acquisition by condemnation have been uniformly followed in holding that the taking of any excess quantum of interest in private property beyond the absolute necessity of the purpose and use for which the property is taken, is simply Void.

It seems reasonably to follow, that the taking of any quantum of interest in the property of these defendants in excess of a temporary, year-to-year leasehold interest, where there will clearly be an excess or "surplus" interest remaining after the temporary defense housing authorized by Congress under the Lanham Act has expired and been fulfilled, is excessive and void. If the Government administrative agency herein has taken what it calls an ostensibly permanent "fee" for temporary

defense housing under the Lanham Act, it is respectfully submitted that the Court has jurisdiction to determine that whether the quantum of interest taken is called a fee, or a qualified fee or a terminable fee, or an easement, is immaterial, as the power delegated to the Administrator under the Lanham Act cannot be stretched beyond the limits of absolute necessity of temporary housing by a mere use of words. Any excessive taking by condemnation is void. Whether an excessive acquisition by purchase would be void also is another question not involved in the present actions.

It seems clearly within the province of the Court to decide that the Lanham Act does not authorize the taking by condemnation of any excess interest more than a temporary use and occupancy in the lands of the defendants for temporary defense housing "for persons engaged in national defense activities," and it is respectfully urged that the herein motions and judgment be granted the defendants accordingly.

SHERMAN & PETERS,

By /s/ DONOVAN O. PETERS,
Attorneys for Certain
Defendants.

[Endorsed]: Filed November 9, 1956.

[Title of District Court and Cause.]

MEMORANDUM AND ORDER

The above-entitled action came on regularly for trial before this Court sitting without a jury on September 21, 1956. The plaintiff appeared by and through the United States Attorney, and the defendants, Mintaxer Estate, Emma J. Malone, Florence E. Taylor, Richard O'Farrell, Jas. P. McAuliffe, Della Bingham and A. Hinchman, appeared by and through their attorneys, Sherman, Peters, Elliott & Hutchins. The matter was by agreement of the parties submitted after oral discussion on written memoranda, all of which memoranda are now on file.

The Court has carefully considered each and all of the memoranda, the authorities there cited, and all other pertinent material. As a result of such consideration, the Court is of the view that every legal issue now sought to be raised by defendants in this case has been determined by the Court of Appeals in *Lewis vs. United States*, 200 F. 2d 183, and in each instance the issue has been determined adversely to the position which the defendants now seek to take in this case. This Court is bound by the decision of the Court of Appeals, so no useful purpose would be served by going beyond this statement of the Court's conclusion.

Under the conditions which now exist in this case, the Court finds adversely to the defendants above named on each motion and matter now be-

fore this Court. The plaintiff will, in accordance with the applicable law and the rules of this Court, prepare and lodge with the Clerk such orders, findings of fact and conclusions of law, form of judgment, and other documents as may be required to complete the final disposition of this case as to the defendants above named.

Dated: November 9, 1956.

/s/ SHERRILL HALBERT,
United States District Judge.

[Endorsed]: Filed November 9, 1956.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above-entitled matter came on regularly for trial before the Honorable Sherrill Halbert, sitting without a jury, on September 21, 1956. The plaintiff appeared by and through J. Harold Weise, Assistant United States Attorney, and the defendants, Richmond Investment Company, Irene Ruth Woods, Eva A. Ockenden and Marin Lumber & Supply Co., appeared by and through their attorneys, Sherman, Peters, Elliott & Hutchins, and pursuant to a stipulation of the parties filed herein, there was presented for determination by the Court the legality and authority of the plaintiff to take a fee simple title to the lands the subject of this

action, and the matter being submitted on written memoranda, and the Court being fully advised finds:

I.

That the Complaint in the above-entitled action was filed herein on the 29th day of December, 1942, and that on said date a Declaration of Taking was filed herein and the sum of Eight Thousand Five Hundred Eighty-two and 11/100 Dollars (\$8,-582.11) was deposited in the Registry of the Court as estimated just compensation for the taking of the fee simple title to the lands the subject of this action, and that upon the filing of the Declaration of Taking and the depositing of the sum aforesaid, the fee simple title to said lands vested in the United States of America and the right to just compensation vested in the persons entitled thereto.

II.

That this proceeding was instituted and the lands hereinafter described were taken and condemned pursuant to and under the provisions and authority of and for the purposes and uses authorized by the Act of August 1, 1888, 25 Stat. 357 (U.S.C. Title 40, Sec. 257); the Act of February 26, 1931, 46 Stat. 1421 (U.S.C. Title 40, Secs. 258(a) to 258(e)); the Act of October 14, 1940 (Public No. 849, 76th Congress), as amended, and Executive Order No. 9070, dated February 24, 1942, the Second War Powers Act (Public Law No. 507, 77th Congress), and Executive Order No. 9150, dated April 28, 1942, funds having been appropriated by the Act

of October 14, 1940 (Public Resolution 106, 76th Congress) and Acts supplementary thereto and amendatory thereof.

III.

That the estate or interest which plaintiff seeks to take and condemn is the full fee simple title in and to the lands hereinafter described, subject to utility easements, if any.

IV.

That the lands hereinafter described were selected by the Acting Commissioner of the Federal Public Housing Authority of the United States for use in connection with defense housing, Richmond, California, and were sought to be taken and condemned for said purpose and use. That the said Acting Commissioner of the Federal Public Housing Authority did not act in bad faith and did not abuse his discretion in making said determination.

V.

That the property the subject of this action is situate in Canal Subdivision, City of Richmond, County of Contra Costa, State of California, and that the respective owners of the parcels of land hereinbelow particularly set forth have, by stipulation filed herein, agreed to accept as full, fair and just compensation for the taking thereof the respective sums, without interest, set opposite their names as follows, to wit:

Parcel	Lot	Block	Owner	Agreed Amount
1	4	27	Richmond Investment Company.....	\$200.00
2	5	27	Richmond Investment Company.....	\$200.00
3	6	27	Richmond Investment Company.....	100.00
5	1	11	Richmond Investment Company.....	200.00
6	2 to 8 incl.	11	Richmond Investment Company.....	800.00
7	9 & 10	11	Richmond Investment Company.....	200.00
9	24 & 25	11	Irene Ruth Woods.....	700.00
11	15 & Ely. 6' of 16	12	Marin Lumber & Supply Co.....	472.00
12	17 & Ely. 19' of 16	12	Eva A. Ockenden.....	528.00
13	18 & 19	12	Irene Ruth Woods.....	600.00

VI.

The Court finds that the allegation contained in paragraph 2 of defendants' answer that the said use of said lands to meet the lawful needs of the plaintiff does not require the fee simple title of said lands is not true; the Court further finds that the allegation of said defendants contained in paragraph 2 that a leasehold in said lands for the duration of the present war and emergency needs would be adequate and reasonable for the public uses of the plaintiff is not true.

Upon the foregoing Findings of Fact, the Court makes the following:

Conclusions of Law

I.

That title to the lands described in paragraph V above vested in fee simple in the United States of America upon the filing of the Declaration of Taking herein and the depositing in the Registry

of the Court of the sum aforesaid, and the fee simple title to said lands is deemed to be and is taken and condemned for the public uses of the United States of America as authorized by law, and that title to said lands above described in fee simple is now vested in the United States of America free and discharged of all claims and liens of every kind whatsoever.

II.

That the Acting Commissioner of the Federal Public Housing Authority of the United States acted within the scope of his power and authority in selecting the lands hereinabove described, and that his determination that a fee interest in said lands should be taken is final.

III.

That the just compensation for the property taken and condemned herein shall be pursuant to the stipulation of the parties filed herein, and as more particularly delineated in paragraph V of the Findings of Fact.

Let a Final Judgment be entered accordingly.

/s/ SHERRILL HALBERT,
Judge, United States District Court, Northern District of California.

Receipt of Copy acknowledged.

Lodged January 22, 1957.

[Endorsed]: Filed January 29, 1957.

In the District Court of the United States in and
for the Northern District of California,
Southern Division

No. 22417

UNITED STATES OF AMERICA,

Plaintiff,

vs.

Certain Parcels of Land In the City of Richmond,
County of Contra Costa, State of California,
MINTAXER ESTATE, et al.,

Defendants.

Final Judgment

Upon the Findings of Fact and Conclusions of
Law herein, and good cause appearing therefor,

It Is Hereby Ordered, Adjudged and Decreed
that title to the lands hereinafter described vested
in fee simple in the United States of America upon
the filing of the Declaration of Taking herein and
the depositing in the Registry of the Court of the
sum of Eight Thousand Five Hundred Eighty Two
and 11/100 Dollars (\$8,582.11) as estimated just
compensation for the taking of the lands subject of
this action, and the fee simple title to said lands
is deemed to be and is taken and condemned for
the public uses of the United States of America as
authorized by law, and that title to said lands here-
inafter described, in fee simple, is now vested in the
United States of America free and discharged of
all claims and liens of every kind whatsoever.

It Is Further Ordered, Adjudged and Decreed that the Acting Commissioner of the Federal Public Housing Authority of the United States acted within the scope of his power and authority in selecting the lands hereinafter described, and that his determination that a fee interest in said lands should be taken is final.

It Is Further Ordered, Adjudged and Decreed that the respective sums, without interest, set opposite the names of the respective persons herewith enumerated be and the same are hereby awarded as full, adequate and just compensation for the taking of the respective parcels of land as hereinbelow set forth:

Parcel	Owner	Amount
1	Richmond Investment Company.....	\$200.00
2	Richmond Investment Company.....	100.00
3	Richmond Investment Company.....	100.00
5	Richmond Investment Company.....	200.00
6	Richmond Investment Company.....	800.00
7	Richmond Investment Company.....	200.00
9	Irene Ruth Woods.....	700.00
11	Marin Lumber & Supply Co.....	472.00
12	Eva A. Oekenden.....	528.00
13	Irene Ruth Woods.....	600.00

The lands, the subject of this Final Judgment, are situate in Canal Subdivision, City of Richmond, County of Contra Costa, State of California, and more particularly described as follows:

Parcel	Lot	Block
1	4	27
2	5	27
3	6	27
5	1	11
6	2 to 8 incl.	11

7	9 & 10	11
9	24 & 25	11
11	15 & Ely.	
	6' of 16	12
12	17 & Ely.	
	19' of 16	12
13	18 & 19	12

Dated January 29, 1957.

/s/ SHERILL HALBERT,

Judge, United States District Court, Northern
District of California.

Entered in Civil Docket January 31, 1957.

Receipt of copy acknowledged.

Lodged January 22, 1957.

[Endorsed]: Filed January 29, 1957.

Entered January 31, 1957.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that Richmond Investment Company, Irene Ruth Woods, Mintzer Estate Company, Marin Lumber & Supply Co., and Eva Ockenden, Defendants and Appellants above named, hereby appeal to the U. S. Court of Appeals for the Ninth Judicial Circuit, from the final judgment entered in the above-entitled action on January 30, 1957.

Dated: February 4th, 1957.

SHERMAN, PETERS,
ELLIOTT & HUTCHINS,

By /s/ DONOVAN O. PETERS,
Attorneys for Certain,
Defendants and Appellants.

[Endorsed]: Filed February 5, 1957.

[Title of District Court and Cause.]

STATEMENT OF POINTS

Pursuant to Rule 75 (d) of the Rules of Civil Procedure, the defendants-appellants hereby state the points on which they intend to rely on their appeal from the final judgment herein as follows:

1. Error of the court in refusing to grant defendants' motion for judgment on the ground that the taking by condemnation of the fee title in the present case was in violation of the established law in eminent domain.

2. Error of the court in failing to make a finding of fact that the fee title absolute rather than a lesser interest or a leasehold was Necessary for the public use as defined in the Lanham Act.

3. Error of the court in failing to make a finding of fact that the taking of the fee title would

cause or be of the least private injury to the private owners.

4. Error of the court in denying the defendants' motions for judgment on each of the seven stated grounds, said motions and supporting memorandum of authorities and established law in eminent domain having been filed with the court in the course of trial.

5. Error of the court in denying the said motions for judgment made and filed by the defendants on the ruling that "This Court is bound by the decision of the Court of Appeals" in *Lewis vs. United States*, 200 F. 2d 183, contrary to other decisions of the Court of Appeals with which the findings and rulings in the said *Lewis* case cannot be reconciled with the established law in eminent domain.

6. Error of the court in failing to make a finding of fact that the Lanham Act authorizes the taking of the fee title By Condemnation for the purpose and use as defined by Congress in that Act.

7. Error of the Court in making the following finding upon which judgment is erroneously predicated:

"That the said Acting Commissioner of the Federal Public Housing Authority did not act in bad faith and did not abuse his discretion in making said determination."

8. Error of the Court in failing to make a finding of fact that the Lanham Act or any other Act

of Congress or law vested discretionary power in the Acting Commissioner of Federal Public Housing Authority, to take by condemnation, the fee title absolute from private owners for the temporary wartime housing use as expressly described by Congress in the Lanham Act.

9. Error of the court in making a finding that the Acting Commissioner "did not act in bad faith and did not abuse his discretion" as an issue upon which to base judgment, it being misleading and not pertinent to any issue in the present case.

Dated: February 15th, 1957.

SHERMAN and PETERS,
Attorneys for Appellants;

By /s/ DONOVAN O. PETERS.

[Endorsed]: Filed February 15, 1957.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, C. W. Calbreath, Clerk of the United States District Court for the Northern District of California, hereby certify the foregoing and accompanying documents, listed below, are the originals filed in this court in the above-entitled case and constitute the record on appeal herein as designated by Counsel for the appellants:

Excerpt from Docket Entries.

Complaint.

Answer of Certain Defendants.

Answer of Eva A. Ockenden.

Stipulation of Facts.

Motions Submitted by Defendants to Court in
Court of Trial.

Memorandum Order of Court.

Findings of Fact and Conclusions of Law.

Final Judgment.

Notice of Appeal.

Designation of Record and Statement of Points
Upon Which Appellants Intend to Rely on Appeal.

In Witness Whereof, I have hereunto set my
hand and affixed the seal of said District Court this
5th day of March, 1957.

[Seal]

C. W. CALBREATH,
Clerk;

By /s/ MARGARET P. BLAIR,
Deputy Clerk.

[Endorsed]: No. 15467. United States Court of Appeals for the Ninth Circuit. Richmond Investment Company, Irene Ruth Woods, Mintzer Estate Company, Marin Lumber & Supply Co., and Eva Ockenden, Appellants, vs. United States of America, Appellee. Transcript of Record. Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed March 5, 1957.

Docketed: March 8, 1957.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

No. 15,467

IN THE

United States Court of Appeals
For the Ninth Circuit

RICHMOND INVESTMENT COMPANY,
IRENE WOODS, et al.,

Appellants,

VS.

UNITED STATES OF AMERICA,

Appellee.

APPELLANTS' OPENING BRIEF.

SHERMAN & PETERS,

DONOVAN O. PETERS,

2100 Mills Tower, San Francisco 4, California,

Attorneys for Appellants.

FILED

JUN 3 1957



Subject Index

	Page
Jurisdictional statement	1
Statement of the case	2
(a) Stipulation	3
(b) Motions	3
Facts	5
Specification of errors	7
1. Omissions in findings of fact and conclusions of law	7
2. The Lanham Act. Its purpose	11
3. Applicable rules in eminent domain	12
4. Burden is on condemnor to allege affirmatively and to prove necessity for fee title as quantum for use speci- fied in Act	15
5. When the Federal Act is silent as to the quantum au- thorized for condemnation the state statute is followed, subject to fundamental principles in eminent domain	16
6. To condemn an excess quantum of interest in lands is to take for other than public use	17
7. Non-existence of express delegation of discretionary power classifies cases applying rule in excess taking in eminent domain	18
8. Questions involving excess taking by condemnation are judicial questions	19
Conclusion	21

Table of Authorities Cited

Cases	Pages
Cincinnati v. Vester (C.C.A. 6th), 33 Fed. (2d) 242, 68 A.L.R. 831, affirmed in 281 U.S. 439	14, 20
E. C. Shevlin Co. v. U. S. (9th Circuit), 146 Fed. (2d) 613	15
Hairston v. Danville & W. R. Co., 208 U.S. 598	20
Halvering v. Hallock, 309 U.S. 106, 125 A.L.R. 1368	10
Lewis v. United States, 200 Fed. (2d) 193	4, 8, 9, 14
Northwestern Fertilizing Co. v. Hyde Park, 97 U.S. 659, 14 A.L.R. 1350	20
Puerto Rico Ry. Light & Power Co. v. U.S. (1st Circuit), 131 Fed. (2d) 491	12, 15
Rindge Co. v. Los Angeles County, 262 U.S. 700	20
Sears v. Akron, 246 U.S. 242	20
Shoemaker v. U. S., 147 U.S. 282	14
U. S. v. Certain Lands in the Town of Narragansett, 145 Fed. 654	6
U. S. v. City of Chester, 144 Fed. (2d) 415	11
U. S. v. Gettysburg Elec. R. Co., 160 U.S. 668	20
U. S. v. Parcel of Land (Square South, I.C.), 100 Fed. Supp. 498, U.S. Court, Dist. of Col.	12
U. S. v. 2.4 Acres of Land, 138 Fed. (2d) 295 (7th Circuit) .	13, 17
U. S. Tenn. Valley Authority v. Welch, 327 U. S. 546	19, 20
Warm Springs Irrig. Dist. v. Pac. Live Stock Co. (1921, C.C.A. 9th), 270 Fed. 560	13, 14

Statutes

California Code of Civil Procedure, Section 1239	16
--	----

TABLE OF AUTHORITIES CITED

iii

Codes

	Pages
Lanham Act (Public No. 849, 76th Cong.), Act of Oct. 14, 1940	1
42 U.S.C.A., Subchapter II, Section 1521	2
28 U.S.C. Sec. 1291 (Act of June 25, 1948, C. 646, Sec. 1, 62 Stats. 929)	1
40 U.S.C., Sec. 257 (August 1, 1888, 25 Stat. 357)	1, 6
40 U.S.C., Sec. 258 (a) to (e)	1

Texts

18 Am. Jur., Eminent Domain, 34, 109, 110, 115	13
18 Am. Jur. 741, Eminent Domain, Sec. 115 and Sec. 26 ...	14
14 A.L.R. 1350	13
68 A.L.R. 837	12
79 A.L.R. 515-516	17
90 A.L.R. 1020	13
Ann. Cas. 1918 A, page 807	14
20 Cal. Jur. 1222	13
Congressional Comments, p. 76 of the U. S. Code of Con- gressional Service	11
Cooley's Constitutional Limitations (8th Ed.), Vol. 2, p. 1193	14
Lewis on Eminent Domain, Vol. 1, Sec. 371	13
1 Nichols on Eminent Domain, Sec. 150	14
10 Ruling Case Law, 88	14



No. 15,467

IN THE

**United States Court of Appeals
For the Ninth Circuit**

RICHMOND INVESTMENT COMPANY,

IRENE WOODS, et al.,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANTS' OPENING BRIEF.

JURISDICTIONAL STATEMENT.

The herein appeal is from a final judgment of the United States District Court, Northern District of California, Southern Division, condemning certain lands in the City of Richmond, County of Contra Costa, State of California, under Act of Congress, approved August 1, 1888, 25 Stat. 357 (U.S.C. Title 40, Sec. 257), the Act of February 26, 1931, 46 Stat. 1421 (U.S.C. Title 40, Secs. 258 (a) to (e); and the Act of October 14, 1940, commonly known as The Lanham Act (Public No. 849, 76th Congress) as amended.

Jurisdiction of this Court on appeal is conferred by Title 28, U.S.C. Sec. 1291. (Act of June 25, 1948, C. 646, Sec. 1, 62 Stats. 929.)

December 29, 1942 was the date of the Declarations of Taking, and the filing of the herein action.

Following the declaration of a National War Emergency on September 8, 1939, Congress passed the said Lanham Act (U.S.C.A., Title 42, Subchapter II, Section 1521), *to provide temporary wartime housing for defense workers.*

The Lanham Act, under which the herein condemnation action was filed refers only to one public purpose, that of temporary wartime housing for war workers in wartime industries, in specially determined localities.

No contention appears to be made by the condemnor that an interest in land is to be taken for any use other than such temporary housing use for war workers.

Consistent with the temporary nature of such use Congress provided for the termination of its authorization in that Act when the declared emergency ended. That occurred on July 25, 1947.

STATEMENT OF THE CASE.

This is an appeal from a judgment of the United States District Court in and for the Northern District of California, Southern Division, Honorable Sherrill Halbert presiding, entered January 31, 1957.

The said action was filed at the instance of the Federal Public Housing Authority, condemning certain lands of numerous small lot owners in Richmond,

Contra Costa County, California, under the Lanham Act providing for temporary wartime housing for a limited classification of temporary wartime workers where such housing was temporarily needed.

(a) Stipulation.

In order to expedite the trial, the parties filed their stipulation (Transcript of Record, pages 13-14) submitting certain key issues to the trial court for determination; the general issue under the pleadings being

“the legality and authority of the plaintiff to take, and for the purposes and uses all as more fully alleged in the complaint on file herein, the fee simple title to the subject property.”

(b) Motions.

The more specific issues submitted to the trial court, under the aforesaid general issue, were presented under the further stipulation as follows:

“and the parties hereto may by motion or responsive pleadings present such issues for determination by the Court.”

Pursuant to said stipulation, the defendants filed their motions for judgment on each or all of the following grounds (Transcript of Record, pages 15-20):

1. On the pleadings that the complaint herein fails to allege facts sufficient to state a cause of action for taking full fee title for the temporary use authorized in the Lanham Act;

2. That the taking of the fee title was an excessive taking of interest in lands beyond the quantum

necessary for the temporary housing use for which it was condemned;

3. That the plaintiff has failed to prove a cause of action for the condemnation of fee title;

4. That the funds on deposit in this court are limited to payment for the temporary use of the lands taken;

5. That the interest taken in condemnation is a temporary interest which may be described as a terminable fee which terminated upon the completion or termination of the temporary use of temporary housing as specifically described in the Lanham Act;

6. That the taking of the fee title to the lands of these defendants is void to the extent of the excess interest beyond the quantum necessary for the temporary housing use for which it was taken and as expressly defined in the Lanham Act;

7. That the disposal or use of the lands of defendants herein other than for defense housing as authorized in the Lanham Act of the time of taking said lands in those condemnation proceedings, be restrained and enjoined.

The above-mentioned motions and action were by agreement of the parties submitted on oral argument by counsel for both parties, and written memoranda were filed with the trial court. Thereupon, the trial court filed herein a "Memorandum and Order" citing a previous decision of the United States Court of Appeals for the Ninth Circuit in *Lewis v. United States*, 200 Fed. (2d) 193, and stating that

“This Court is bound by the decision of the Court of Appeals, so no useful purpose would be served by going beyond this statement of the Court’s conclusion.”

This appeal does not concern the values of the lands condemned which are covered by the said stipulation, but has been centered upon specific issues, principally a single issue under the pleadings and by stipulation of the parties as follows:

Was the Housing Administrator authorized by Congress under the Lanham Act to acquire *by condemnation*, the fee simple title absolute, in private lands instead of a lesser quantum of interest, such as leasehold, necessary for the *temporary wartime housing* as specifically described in said Lanham Act?

FACTS.

On and before December 29, 1942, the appellants herein were the private owners of parcels of land adjacent to the wartime shipyards in the port of the City of Richmond, Contra Costa County, California. On said date the herein condemnation action was filed at the instance of the Commissioner of the Federal Public Housing Authority of the United States, herein referred to as the Housing Administrator.

No service of copies of the Declarations of Taking or Judgments entered thereon were ever made upon the defendants. No claim or allegation is made by the Housing Administrator that any effort was made to

acquire the lands by voluntary purchase or lease before the filing of condemnation proceedings.

The plaintiff condemnor relies upon the "Act of Congress approved August 1, 1888, 25 Stat. 357 (U.S.C. Title 40, Sec. 257)" for his authorization to condemn the fee title absolute. However that Act merely provides *generally* that whenever the Secretary of the Treasury or "any other officer of the Government *has been or shall be authorized* to procure real estate" for public use "he shall be authorized to acquire the same for the U. S. by condemnation, under judicial process, whenever in his opinion it is necessary or advantageous to the Government to do so".

It is noted that this Act does not grant any discretionary power to condemn a greater quantum of interest in land than is necessary to the public use specified. There is no exception in the Act to the laws of eminent domain.

As said in *U. S. v. Certain Lands in the Town of Narragansett*, 145 Fed. 654, the statute pleaded (U.S.C. 40, Sec. 257), "does not confer a general authority to acquire land, but only authority to institute condemnation proceedings in furtherance of, or in execution of *authority otherwise granted* to procure real estate for public purposes". The test in eminent domain of what quantum of interest in land can be condemned for a temporary use still applies. We are required to examine the Act of Congress whereby the officer of the Government "has been or shall be authorized". This brings us to the Lanham Act which provides as follows:

“Sec. 1521 (title 42) Federal Works Administrator’s Powers Respecting Defense Housing.

“In order to provide housing for persons engaged in national-defense activities, and their families, and living quarters for single persons so engaged, in those areas or localities in which the President shall find that an acute shortage of housing exists or impends which would impede national-defense activities and that such housing would not be provided by private capital when needed, the Federal Works Administrator (hereinafter referred to as the ‘Administrator’) is authorized:

(a) To acquire prior to the approval of title by the Attorney General (without regard to section 1339 of Title 10 and section 5 of Title 41), improved or unimproved lands or interests in lands by purchase, donation, exchange, lease (without regard to sections 40a and 34 of Title 40, or any time limit on the availability of funds for payment of rent), *or condemnation* (including proceedings under sections 257, 258, 361-368, and 258a-258e of Title 40).

“(etc.) * * *” (Our italics.)

SPECIFICATION OF ERRORS.

1. OMISSIONS IN FINDINGS OF FACT AND CONCLUSIONS OF LAW.

There is no evidence in the record, and no finding of fact or conclusion of law by the Trial Court that the Lanham Act vests in the Housing Administrator his claimed *discretionary power* to decide on the quantum

of interest in land he will take *by condemnation* for the temporary use specified by Congress.

This omission is a vital error going to the heart of the herein appeal. The Administrator arbitrarily elected to take the fee title absolute by condemnation for merely a temporary housing use. The Administrator erroneously assumed that Congress gave him such personal discretion. However, Congress gave no such power and the well established rules in eminent domain deny such power, and restrict the taking of interests in land by condemnation to the quantum necessary for the public use described expressly in the enabling Act of Congress. Any excess taking is unlawful and void.

Appellants are entitled to a direct and specific response to this point by the condemnor herein, by citing the exact words of the Lanham Act relied upon for such claimed discretionary power.

It is earnestly urged that there must be a specific finding of fact covering this factual issue in order to support the judgment in this case regardless of any precedent in the *Lewis* case (*supra*). It is submitted that the defendants, appellants herein, are entitled to proper and adequate findings of facts in this case, regardless of whatever facts may have been found in any other case in which the herein defendants were not parties.

The Lanham Act relied upon by the Housing Administrator for his authorization by Congress does not expressly and without resort to inference grant dis-

cretionary power to him whereby he can elect to take *any quantum of interest in land* he might deem proper, even to the extent of disregarding the temporary character of the use. A finding of fact relating to the Lanham Act on this factual point is necessary to support the judgment herein.

It appears that the Act authorized the Housing Administrator to SELECT the parcels of land which in his discretion would be suitable. But *selecting* the land is far different from a grant of discretion to determine the *quantum of interest* to be taken.

Finding of Fact number IV, is misleading in that it relates merely to the *selection* of the particular land. (See Transcript of Record, page 24.)

Conclusion of Law numbered II, is likewise misleading in that it merely relates to the *selection* of the particular land for condemnation. (See Transcript of Record, page 26.)

There is no issue presented herein that the lands in question were not properly "selected". The *quantum of interest in said lands* is the vital issue in this case.

The defendants seek the protection of this Appellate Court regardless of the *Lewis* case (*supra*) in their rights to a direct finding in this connection relating to the specific language in the Lanham Act.

It seems clear that if the Lanham Act was incorrectly construed in the previous *Lewis* case by reading into that statute an *implied* provision granting the discretionary power in question, although no such express grant of power is actually stated therein, the

Court of Appeals it not bound by that previous decision based upon different findings of facts. It is of course not necessary to perpetuate a mistake or oversight in reading the Lanham Act as we believe happened in that case. As Justice Frankfurter said in *Halvering v. Hallock*, 309 U.S. 106, 125 A.L.R. 1368:

“We recognize that stare decisis embodies an important social policy. It represents an element of continuity in the law, and is rooted in the psychologic need to satisfy reasonable expectations. But stare decisis is a principle of policy and not a mechanical formula of adherence to the latest decision, however recent and questionable, when such adherence involves collision with a prior doctrine more embracing in its scope, intrinsically sounder, and verified by experience.”

This appeal pinpoints the question:

Did Congress in the Lanham Act, *expressly* authorize the Housing Administrator to exercise his uncontrolled discretion in taking by condemnation, more than a temporary use or interest in lands for merely a temporary wartime housing use?

The answer to the above question involves the construction of the specific wording of the Lanham Act, in the light of established rules of law in eminent domain, in order to meet the basic issue in this case.

2. THE LANHAM ACT. ITS PURPOSE.

The purpose or use specifically described in the Lanham Act was limited to a temporary housing use. It is not disputed that pursuant thereto, temporary housing was constructed on the land to accommodate war-workers in the nearby Richmond shipyards.

The need for temporary housing was limited in the Act to "persons engaged in national defense activities", being the shipyards in Richmond, California in the present instance. The Housing Administrator has never claimed that the condemnation was for any other use than such temporary housing.

That a temporary use was intended by Congress in the Lanham Act is indicated in *U.S. v. City of Chester*, 144 Fed. (2d) 415, wherein the Government condemned a leasehold in 13½ acres, instead of the fee simple title. The Court observed that "The dwellings were to be of temporary construction designed for the present war emergency in order to obviate a shortage of housing for war-workers in the Chester area."

It was further said in Congressional Comments, p. 76 of the U. S. Code of Congressional Service, regarding the Lanham Act:

"It was never considered by the Committee that this housing should be designed for use as slum-clearance projects or to provide subsidized housing for persons of low income.

The present Act permits the disposal of any of the housing built under its authority as soon as they are completed, and directs that all of them shall be disposed of after the emergency has ended."

The Act clearly states two procedures for the Administrator to acquire interests in privately owned lands:

- a. By ordinary Civil process of purchase, donation, exchange, or lease.
- b. By CONDEMNATION.

The latter process of acquisition being an extraordinary process, is bound around by the well established rules of law in eminent domain.

3. APPLICABLE RULES IN EMINENT DOMAIN.

(a) Acts of Congress such as the Lanham Act, insofar as authorization to condemn privately owned lands is concerned, must be *strictly construed*, and are limited by the rules in eminent domain to the condemnation of only a quantum of interest actually necessary for the specific use authorized.

68 A.L.R. 837.

“The interest taken by an exercise of the power of eminent domain always depends on the construction of the statute, authorizing the taking, and is limited to the express terms or clear implication of the statute in which the grant is contained.”

Puerto Rico Ry. Light & Power Co. v. U.S.
(1st Circuit), 131 Fed. (2d) 491;

U.S. v. Parcel of Land (Square South, I.C.),
100 Fed. Supp. 498 at 504, U.S. Court, Dist.
of Col.

“The laws authorizing exercise of the sovereign power of eminent domain are to be strictly followed.”

U.S. v. 2.4 Acres of Land, 138 Fed. (2d) 295 (7th Circuit).

“The authority to condemn will be strictly construed in favor of the owner of the property taken and against the condemnor, and the authority must be strictly pursued.”

Warm Springs Irrig. Dist. v. Pac. Live Stock Co. (1921, C.C.A. 9th), 270 Fed. 560.

For example, a power transmission line over land requires only an easement for which the fee title could not be condemned, as that would be an excessive taking. (Authorities collected in 90 A.L.R. 1020; 14 A.L.R. 1350; 18 Am. Jur., “Eminent Domain”, 34, 109, 110, 115; 20 C.J. 1222.)

(b) The quantum of interest in lands to be condemned is limited to the specific public purpose stated in the particular Act of Congress.

If a clear discretionary power is not expressly provided in the Act but is merely implied and assumed by the Agency, the power does not exist.

“The exercise of the power of eminent domain being against common right, cannot be implied or inferred from vague or doubtful language, but must be given in express terms or by necessary implication. When the right to exercise the power can only be made out of argument and inference, it does not exist.”

Lewis on Eminent Domain, Vol. 1, Sec. 371.

“When an easement will be sufficient, no intendment or rule of liberal construction will be indulged to support an attempt to obtain any greater interest or estate.”

Shoemaker v. U. S., 147 U.S. 282;

Cincinnati v. Vester, 33 Fed. (2d) 242;

1 Nichols on Eminent Domain, Sec. 150;

Cooley's Constitutional Limitations (8th Ed.),
Vol. 2, p. 1193.

It seems to follow, that any doubt concerning the quantum of interest in lands which Congress authorized the Housing Administrator to take by the alternative procedure of condemnation under the Lanham Act is properly resolved in favor of the private land owner. (Further discussion and authorities in 18 Amer. Jur. 741, Eminent Domain, Sec. 115 and Sec. 26; Ann. Cas. 1918 A, page 807; 10 Ruling Case Law, 88.)

(c) Temporary quantum for temporary use.

The Court of Appeals (9th Circuit) in this proceeding will doubtless take into consideration its own previous ruling as stated in *Warm Springs Irr. Dist. v. Pacific L. S. Co.* (9th Circuit), 270 Fed. 560 (for a reservoir site), that where the interest to be taken by condemnation is not expressly stated in the statute, the condemnor is presumed to take no greater interest than an easement, if an easement is sufficient to satisfy the purpose of the taking. Surely the *Lewis* case (supra) is not intended to reverse the ruling of the 9th Circuit in the above cited *Warm Springs* case.

4. BURDEN IS ON CONDEMNOR TO ALLEGE AFFIRMATIVELY AND TO PROVE NECESSITY FOR FEE TITLE AS QUANTUM FOR USE SPECIFIED IN ACT.

Failure or omission of the condemning agency of the Government to allege and prove affirmatively that fee title is the necessary quantum for the particular temporary use authorized, is an admission that no necessity exists beyond the temporary housing intended. The position of the Government or Agency as a litigant seeking to establish its statutory rights in condemnation proceedings is exactly the same as that of any other litigant. On this point, it is respectfully urged that the trial court disregards the decision of the Court of Appeals (9th Circuit), in the case of:

E. C. Shevlin Co. v. U. S. (9th Circuit), 146 Fed. (2d) 613 at 615.

The failure of such proof was held to be fatal to the taking of private property in the case of *Puerto Rico Ry. L. & P. Co. v. United States* (1st Circuit), 131 Fed. (2d) 491 at 500. That case seems to emphasize the strict construction placed upon any Congressional authorization in eminent domain, and established policy is to give the benefit of any doubt in every case of condemnation, to favor the private property rights where Congress delegates the power of eminent domain to an agency.

5. WHEN THE FEDERAL ACT IS SILENT AS TO THE QUANTUM AUTHORIZED FOR CONDEMNATION THE STATE STATUTE IS FOLLOWED, SUBJECT TO FUNDAMENTAL PRINCIPLES IN EMINENT DOMAIN.

Since the Lanham Act omits to define, by express limitation, the quantum of interest in lands that the agency may take by condemnation for a temporary use, and does not expressly delegate discretionary power to the agency to take whatever quantum it might desire to take, then the California laws should control.

Under California statutes the purpose or use of "temporary housing" for war-workers during a particular period of national emergency, would be classified as a public purpose for which an easement (not a fee title) would be proper. (Calif. Code of Civil Procedure, Sec. 1239.)

It seems significant that the California statutes covering the exercise of the right of eminent domain clearly and expressly state when the fee title may be condemned, and when easements are proper.

C. C. P. 1239. Estates in Land Subject to Condemnation: "The following is a classification of the estates and rights in lands subject to be taken for public use:

1. A fee simple, when taken for public buildings or grounds, or for permanent buildings, for reservoirs, etc.

2. An easement, when taken for any other use;

* * * * *

"It has been held that laws authorizing the exercise of the sovereign power of eminent do-

main are to be strictly followed, Delaware L. & W. R. Co. v. Morristown, 276 U. S. 182, 48 S. Ct. 276, 72 L. Ed. 523, 56 A.L.R. 756; City of Cincinnati v. Vester, 281 U. S. 439, 50 S. Ct. 360, 74 L. Ed. 950, and that the practice and procedure in condemnation proceedings in Federal Courts must be according to the forms and methods of procedure afforded by the law of the State in which the court sits. United States v. Miller, 317 U. S. 369, 380.”

U. S. v. 2.4 Acres, etc., 138 Fed. (2d) 295 (Ill.), (7th Circuit), Oct. 26, 1943.

6. TO CONDEMN AN EXCESS QUANTUM OF INTEREST IN LANDS IS TO TAKE FOR OTHER THAN PUBLIC USE.

The weight of authorities reviewed in 79 A. L. R. 515-516, support the rules discussed hereinabove in eminent domain:

“ ‘Inasmuch as property cannot constitutionally be taken by eminent domain except for the public use, it follows that no more property shall be taken than the public use requires; and that rule applies both to the amount of property and the estate or interest in such property to be acquired by the public.

“ ‘If an easement will satisfy the requirements of the public, to take the fee would be unjust to the owner, who is entitled to retain whatever the public needs do not require, and to the public which should not be required to pay for more than it needs.

“ ‘Furthermore, it is universally recognized that a grant of the power of eminent domain will not

be extended by implication, and that, when an easement will satisfy the purpose of the grant, the power to condemn the fee will not be included in the grant unless it is so expressly provided.

“ ‘Accordingly, it is well settled that when land is taken for the public use, unless the fee is necessary for the purposes for which the land is taken, as, for example, when land is taken for a school-house, or the statute expressly provides that the fee shall be taken, the public acquires only an easement.’ ”

7. NON-EXISTENCE OF EXPRESS DELEGATION OF DISCRETIONARY POWER CLASSIFIES CASES APPLYING RULE IN EXCESS TAKING IN EMINENT DOMAIN.

The numerous federal as well as state authorities in eminent domain may be classified and substantially harmonized into two groups:

(a) Those cases relating to condemnations under particular enactments by Congress, such as the Second War Powers Act, in which *discretionary power is expressly delegated* by the legislative branch of the Government to an executive officer or agency to take whatever quantum of interest in lands the agency might choose.

(b) Cases in which *no such discretionary power has been expressly delegated* by Congress.

In the present case, as the authorities which we have hereinabove discussed seem clearly to show, the discretionary power in question claimed by the Housing Administrator, must be clearly shown by express

authorization in the Lanham Act, and *cannot be implied* from any general wording of the statute.

We can only submit that there was no such power granted by Congress in the Lanham Act. When it is not expressly stated in the Act it does not exist. It follows that since the Lanham Act contains no such express delegation of discretionary power to the Housing Agency, this case does not raise any question of bad faith, or capricious or arbitrary taking, but simply an excess taking.

8. QUESTIONS INVOLVING EXCESS TAKING BY CONDEMNATION ARE JUDICIAL QUESTIONS.

We believe that the opinion in *U. S. Tenn. Valley Authority v. Welch*, 327 U. S. 546, states the rule applicable in the present instance as follows:

“It is well settled, of course, that ordinarily, the necessity of taking for public use is a legislative and not a judicial question, and, when determined by the legislature, or by an agency created for that purpose, is not subject to review by the courts. It is equally well settled, however, that ‘the nature of the use, whether public or private, is ultimately a judicial question.’

Consequently, where property is taken in excess of that required for the authorized public use, the excess to be used for some other purpose, the courts have power so to declare.” (Citations.)

Whether a Government Agency abuses its power or inadvertently makes a mistake in the exercise of an assumed power beyond its authorization, in either

event such acts of the agency are void and should be so declared and discontinued by a judicial determination.

Cincinnati v. Vester (C.C.A. 6th), 33 Fed. (2d)

242, 68 A.L.R. 831, affirmed in 281 U.S. 439;

Northwestern Fertilizing Co. v. Hyde Park, 97

U.S. 659, 666, 14 A.L.R. 1350;

Rindge Co. v. Los Angeles County, 262 U.S. 700;

Sears v. Akron, 246 U.S. 242;

Hairston v. Danville & W. R. Co., 208 U.S. 598;

U. S. v. Gettysburg Elec. R. Co., 160 U.S. 668.

The Tenn. Valley Authority Act expressly granted discretionary power to the Authority to condemn any interest in property that the Authority "deems necessary for carrying out the purposes of this Act." Congress did not delegate any such broad discretion to the Housing Agency in the Lanham Act.

Mr. Justice Reed's concurring opinion in *U. S. Tenn. Valley Authority v. Welch*, 327 U. S. 546, supports the rule as follows:

"It is my opinion that the TVA is a creature of its statute and bound by the terms of that statute, and that its every act may be tested judicially, by any party with standing to do so, to determine whether it moves within the authority granted to it by Congress. (*Amer. School of M. Healing v. McAnnulty*, 187 U. S. 94.)"

Justice Reed further ruled:

"This taking is for a public purpose, but whether it is or is not is a judicial question. Of

course, the legislative determination has great weight but the constitutional doctrine of Separation of Powers would be unduly restricted if an administrative agency could invoke a so-called political power so as to immunize its action against judicial examination in contests between the agency and the citizens. The former cases go no further than this. (Citing: *U.S. v. Gettysburg Elec. R. Co.*, 160 U. S. 668, 680; *Rindge Co. v. Los Angeles County*, 262 U. S. 700, 709; *Old Dominion Land Co. v. U. S.*, 269 U. S. 55, 66; *Cincinnati v. Vester*, 281 U. S. 439, 446.)”

“Consequently, where property is taken in excess of that required for the authorized public use, the excess to be used for some other purpose, the courts have power so to declare.”

“The taking of such excess land is not for a public use. Whether the particular use authorized is public is always a question for the judiciary.”

“It is said that, in the construction of statutes conferring the power of eminent domain, every reasonable doubt is to be resolved adversely to the right; that the affirmative must be shown, as silence is negation; and that unless both the spirit and letter of the statute clearly confer the power, it cannot be exercised. *Fertilizing Co. v. Hyde Park*, 97 U. S. 659, 666, 24 L. Ed. 1036.”

CONCLUSION.

In conclusion, the simple and direct statements in the Lanham Act show that Congress was seeking only to meet certain abnormal and temporary housing

needs arising in a period of National Emergency. The wording of the Act states the temporary housing purpose and use as the precise limit of any powers that Congress intended to grant to the Housing Administrator. The Administrator cannot enlarge such limits by inference or by any assumed or implied broad interpretation of the text of that Act. These conclusions seem to be well-established by the facts and the authorities cited hereinabove.

The appellants submit that Congress intended to provide only temporary emergency housing for a restricted type of temporary war workers in its enactment of the Lanham Act; that if the agency elected to ignore its authorization to acquire interests in land by voluntary purchase, lease, or gift, and instead elected to condemn, then by such election of procedure, the agency necessarily chose to submit to the existing laws and established rules in eminent domain limiting the quantum of his taking.

The Housing Agency is not able to cite any provision or wording in the Lanham Act which expressly grants to it the discretionary power in question and at issue in this case. Consequently, the attempted taking herein of the permanent fee title absolute for merely temporary housing is an unlawful taking of an excess quantum of interest in private lands not for the public use as authorized by Congress, and is therefore void. Such excess taking fully justifies reversal of the judgment entered herein, and restoration of the lands to their respective private owners since their temporary use under the Lanham Act expired and

was fully satisfied long ago in 1947 when the National Emergency was terminated by the President.

Dated, San Francisco, California,
May 28, 1957.

Respectfully submitted,
SHERMAN & PETERS,
By DONOVAN O. PETERS,
Attorneys for Appellants.



In the United States Court of Appeals
for the Ninth Circuit

RICHMOND INVESTMENT COMPANY, IRENE RUTH
WOODS, MINTZER ESTATE COMPANY, MARIN LUM-
BER AND SUPPLY COMPANY, AND EVA OCKENDEN,
APPELLANTS

v.

UNITED STATES OF AMERICA, APPELLEE

*Upon Appeal from the United States District Court
for the Northern District of California
Southern Division*

BRIEF FOR THE UNITED STATES, APPELLEE

PERRY W. MORTON,
Assistant Attorney General,

LLOYD H. BURKE,
*United States Attorney,
San Francisco, California,*

J. HAROLD WEISE,
*Assistant United States Attorney,
San Francisco, California,*

ROGER P. MARQUIS,
FRED W. SMITH,
*Attorneys, Department of Justice,
Washington, D. C.*

FILED

JUL 10 1957



I N D E X

	Page
Opinion below	1
Jurisdiction	1
Statute involved	2
Question presented	4
Statement	4
Argument:	
This Court's decision on an identical situation concludes the present case.....	5
Conclusion	8

CITATIONS

Cases:

<i>Berman v. Parker</i> , 348 U.S. 26.....	7
<i>Lewis v. United States</i> , 200 F.2d 183, 345 U.S. 907	7

Statute:

Lanham Act, 42 U.S.C. sec. 1521.....	6
--------------------------------------	---



**In the United States Court of Appeals
for the Ninth Circuit**

No. 15467

RICHMOND INVESTMENT COMPANY, IRENE RUTH
WOODS, MINTZER ESTATE COMPANY, MARIN LUM-
BER AND SUPPLY COMPANY, AND EVA OCKENDEN,
APPELLANTS

v.

UNITED STATES OF AMERICA, APPELLEE

*Upon Appeal from the United States District Court
for the Northern District of California
Southern Division*

BRIEF FOR THE UNITED STATES, APPELLEE

OPINION BELOW

The district court's memorandum and order (R. 21-22) is not reported. It was entered November 9, 1956, and sets forth the trial court's reason for rejection of appellants' objections to the taking.

JURISDICTION

The jurisdiction of the district court of this condemnation proceeding was invoked under the provisions of the Act of August 1, 1888, 25 Stat. 357, 40 U.S.C. sec. 257, the Act of February 26, 1931, 46 Stat. 1421, 40 U.S.C. sec. 258(a) to 258(e), the Act of October 14, 1940, 54 Stat. 1125, 42 U.S.C. sec. 1521 *et seq.*, as amended, Executive Order No.

9070, dated February 24, 1942, and Executive Order No. 9150, dated April 28, 1942, funds having been appropriated by the Act of October 14, 1940 (Public Resolution 106, 76th Congress Land Acts supplementary thereto and amendatory thereof). Final judgment was entered by the district court on January 31, 1957, and notice of appeal was filed on February 5, 1957 (R. 27-29). The jurisdiction of this Court is invoked under 28 U.S.C. sec. 1291.

STATUTE INVOLVED

The Lanham Act of October 14, 1940, as amended, 54 Stat. 1125, 42 U.S.C. sec. 1521, provides as follows:

In order to provide housing for persons engaged in national-defense activities, and their families, and living quarters for single persons so engaged, in those areas or localities in which the President shall find that an acute shortage of housing exists or impends which would impede national-defense activities and that such housing would not be provided by private capital when needed, the Federal Works Administrator¹ (hereinafter referred to as the "Administrator") is authorized:

¹ By Executive Order 9070, the functions, powers and duties of the Federal Works Administrator were consolidated with those of other housing agencies of the Government and transferred to the National Housing Agency. By Executive Order 9150, the Federal Public Housing Commissioner of the National Housing Agency, was authorized to acquire and dispose of property. Subsequent to the filing of the present case there occurred other changes in the organization of the federal housing agencies which are irrelevant here.

(a) To acquire prior to the approval of title by the Attorney General * * * improved or unimproved lands or interests in lands by purchase, donation, exchange, lease, * * * or condemnation, (including proceedings under sections 257, 258, 301-368, and 258a-258e of Title 40).

(b) By contract or otherwise * * * prior to the approval of title by the Attorney General to make surveys and investigations, plan, design, construct, remodel, extend, repair, or demolish structures, buildings, improvements, and community facilities, on lands or interests in lands acquired under the provisions of subsection (a) hereof or on other lands of the United States which may be available, * * * *Provided*, That the cost per permanent family-dwelling unit shall not exceed an average of \$3,750 for all types of construction * * * *Provided further*, That where the Administrator shall consider that there is no reasonable prospect of disposing of such housing to meet a need extending beyond the emergency he shall construct temporary units: * * *

The Act of August 1, 1888, 25 Stat. 357, 40 U.S.C. sec. 257, provides as follows:

In every case in which the Secretary of the Treasury or any other officer of the Government has been or shall be, authorized to procure real estate for the erection of a public building or for other public uses he shall be authorized to acquire the same for the United States by condemnation, under judicial process, whenever in his opinion it is necessary or advantageous to the Government to do so. * * *

QUESTION PRESENTED

Whether the Lanham Act authorized the condemnation of a fee simple title to land on which housing was to be constructed under the terms of the Act.

STATEMENT

In December, 1942, the United States instituted this proceeding to condemn the fee simple title to certain lands in the City of Richmond, California, for use in connection with defense housing (Compl., R. 3-7). A declaration of taking was filed and the sum of \$8,582.11 was deposited as estimated just compensation (R. 27). Appellants, defendant landowners, filed answers (R. 7-10, 10-12) alleging that fee title was not necessary and asking that the interest to be acquired be limited to a leasehold. By stipulation the measure of compensation was agreed upon and that issue was removed from contention. The stipulation reserved all other issues for the district court, more specifically "the issues relating to the legality and authority of the plaintiff, to take * * * the fee simple title to the subject property," and provided that such issues might be presented by motion, which was thereafter done (R. 13-16).

On January 29, 1957, the trial court filed findings of fact and conclusions of law (R. 22-26). The court found, *inter alia*, that the Acting Commissioner of the Federal Public Housing Authority had selected the condemned lands for use in connection with public housing and that he did not act in bad faith or abuse his discretion in making his determination

(Fdg. IV, R. 24). The district court found appellants' allegations that a fee simple title was not necessary were not true, and also that their allegation that a leasehold was sufficient was likewise untrue (Fdg. VI, R. 25). The court concluded that the Commissioner acted within the scope of his power and authority in selecting the lands and that "his determination that a fee interest in said lands should be taken is final." Judgment in accordance therewith was entered on January 31, 1957, and this appeal followed (R. 27-29).

ARGUMENT

This Court's Decision On An Identical Situation Concludes the Present Case

In disposing of appellants' objections the trial court stated (R. 21):

The Court has carefully considered each and all of the memoranda, the authorities there cited, and all other pertinent material. As a result of such consideration, the Court is of the view that every legal issue now sought to be raised by defendants in this case has been determined by the Court of Appeals in *Lewis v. United States*, 200 F.2d 183, and in each instance the issue has been determined adversely to the position which the defendants now seek to take in this case. This Court is bound by the decision of the Court of Appeals, so no useful purpose would be served by going beyond this statement of the Court's conclusion.

That the trial court was entirely correct in the view that this Court's decision in the *Lewis* case is

dispositive of the present case is apparent from a mere reading of that decision. The present case is an exact duplicate of the *Lewis* case, and in rejecting the same contentions now made by appellants, this Court exhaustively analyzed the relevant section of the Lanham Act, 42 U.S.C. sec. 1521, stating (200 F.2d at p. 184) :

Congress, under the Lanham Act, has delegated wide authority to the Federal Works Administration to condemn lands for use in carrying out the directives of the Act. In section 1 (a) the Administrator is given power to acquire land by "purchase * * * or condemnation." No distinction is made in the Act between what may be purchased and what may be condemned. And it now is well established that the Government's power to condemn is coextensive with its power to purchase [Citing cases]. Thus, if the Administrator might purchase the fee simple title in property for use under the provisions of the Lanham Act, he may acquire the fee simple title by condemnation proceedings.

* * * *

* * * The Lanham Act does not limit the quantum of interest in property which may be acquired * * *. The Administrator was thus given discretion to acquire either the entire fee, or a lesser interest. Nor does the requirement that the acquired property be disposed of as quickly as possible after the emergency ceases preclude the acquisition of the entire fee. For "the government, just as anyone else, is not required to proceed oblivious to elements of cost" in the exercise of its power of eminent domain (p. 185).

The trial court's further conclusion that the Commissioner's determination "that a fee interest should be taken is final" is no more open to question. On this subject this Court stated in the *Lewis* case (200 F.2d at p. 185) :

Congress, by the Lanham Act, has empowered the Administrator at his discretion to acquire the land needed for defense housing by condemnation, and to take the interest which in his opinion will be most advantageous to the Government. There is no claim of bad faith in this case, and we cannot say that the evidence required a finding that the authorized officer abused his discretion in determining the amount and interest in land he decided to condemn. Therefore, his decision was final. *United States v. Meyer*, 7 Cir., 1940, 113 F.2d 387; *Simmonds v. United States*, 9 Cir., 1952, 199 F.2d 305.

The Supreme Court denied the petition for writ of certiorari in the *Lewis* case, 345 U.S. 907.

The only event of significance here subsequent to the *Lewis* decision is the reaffirmation by the Supreme Court in *Berman v. Parker*, 348 U.S. 26 (1954), of the principles there declared by this Court.

Not only are the relevant facts of the *Lewis* case identical to those here presented but the principal appellants were also appellants in the *Lewis* case.¹ Moreover the objections made and arguments advanced both to this Court and to the Supreme Court

¹ The *Lewis* case was actually two cases and in No. 13207 the appellants included Richmond Investment Co., Mintzer Estate Company and Irene R. Woods who are also appellants here.

in the *Lewis* case were the same as are now advanced by appellants. A comparison of appellants' present brief with those filed in the *Lewis* case demonstrate that nothing new or different is here presented. Appellants fail therefore to suggest any reasonable doubt as to the correctness of the *Lewis* case. The fallacies of the appellants' arguments were made clear in our briefs in the *Lewis* appeal. We respectfully refer this Court to those briefs should it desire to do so.

CONCLUSION

Since for the reasons stated we believe that the appeal is frivolous and does not merit the time of all concerned and the expense of oral argument, we are filing herewith a motion to affirm summarily. It is submitted that the judgment below should be affirmed.

PERRY W. MORTON,
Assistant Attorney General,

LLOYD H. BURKE,
United States Attorney,
San Francisco, California,

J. HAROLD WEISE,
Assistant United States Attorney,
San Francisco, California,

ROGER P. MARQUIS,
FRED W. SMITH,
Attorneys, Department of Justice,
Washington, D. C.

JULY 1957

No. 15,467

IN THE

United States Court of Appeals
For the Ninth Circuit

RICHMOND INVESTMENT COMPANY,
IRENE WOODS, et al.,
Appellants,

VS.

UNITED STATES OF AMERICA,
Appellee.

APPELLANTS' CLOSING BRIEF.

SHERMAN & PETERS,

DONOVAN O. PETERS,

2100 Mills Tower, San Francisco 4, California,

Attorneys for Appellants.

FILED

JUL 24 1957

PAUL P. O'BRIEN, CLERK



Subject Index

	Page
A. Discretionary power in question not expressly delegated by Congress to Agency	3
B. Analysis of opinion and conclusions in the Lewis case, and need for clarification and restatement of principles of law in eminent domain	6
Analysis of statements of law in Lewis case	6
Conclusions	9

Table of Authorities Cited

Cases

	Pages
E. C. Shevlin Co. v. U. S. (9th Circuit), 146 F. 2d 613.....	2
Lewis v. United States, 200 F. 2d 183, 345 U.S. 907.....	1, 5, 6
Simmonds v. U. S. (9th Circuit), 199 Fed. 305	9
Warm Springs Irr. Dist. v. Pacific Live Stock Co. (1921), 270 Fed. 560	2, 4, 5

Texts

I Lewis on Eminent Domain, Section 371	5
--	---

THE UNIVERSITY OF CHICAGO

THE EAST ASIAN LIBRARY

1964

1964

1964

1964

1964

1964

No. 15,467

IN THE

**United States Court of Appeals
For the Ninth Circuit**

RICHMOND INVESTMENT COMPANY,

IRENE WOODS, et al.,

Appellants,

VS.

UNITED STATES OF AMERICA,

Appellee.

APPELLANTS' CLOSING BRIEF.

This review on appeal seems to be narrowed in scope by the failure of Appellee to dispute the soundness of the single points and authorities submitted in Appellants' opening brief. Instead, the Appellee attempts to slam the door tightly shut against a hearing on the Appellants' position in eminent domain, and to lock the door with the *Lewis* case, *Lewis v. United States*, 200 F. 2d 183, 345 U.S. 907. Appellee does not deny that some of the Appellants herein were not parties in the *Lewis* case. In attempting to further bolt the door, against a hearing, the Appellee quotes from the opinion of the Court written in support of the decision in the *Lewis* case as the conclud-

ing last word, apparently assuming that this Court will refuse to re-examine or clarify its statements of the law of eminent domain, as they may be reapplied in the present case.

If we are to follow blindly and literally the expressions of opinion and conclusions of law in the *Lewis* case, as conclusively determining the application of the law in eminent domain in the present case, we then feel the need of reconciling as well as the other decisions of the 9th Circuit in eminent domain with which the *Lewis* case conflicts.

Appellee's position would require a reversal of the rulings and decisions of this Court in the following cases:

Warm Springs Irr. Dist. v. Pacific L. A. Co.
(9th Circuit), 270 Fed. 560.

Held: that where the interest to be taken by condemnation is not expressly stated in the statute, the condemnor is presumed to take *no greater interest than an easement, if an easement is sufficient to satisfy the purpose of the taking.*

E. C. Shevlin Co. v. U. S. (9th Circuit), 146 F.
2d 613 at 615.

Held: that failure or omission of the condemning agency of the Government to allege and prove affirmatively that fee title is the necessary quantum for the particular temporary use authorized, is an admission that no necessity exists beyond the temporary use intended.

A. DISCRETIONARY POWER IN QUESTION NOT EXPRESSLY
DELEGATED BY CONGRESS TO AGENCY.

The *Lewis* case *does not hold* that the Lanham Act EXPRESSLY delegates discretionary power to the Housing Administrator to take BY CONDEMNATION, whatever quantum of interest in privately owned lands he might choose or in his own personal opinion deem proper. Consequently if the agency elects *to condemn*, it automatically submits to the restrictions imposed in eminent domain. This is the turning point of the present case.

If that discretionary power is not so delegated *expressly* by Congress, are we to assume that the *Lewis* case is to be arbitrarily followed on the theory that such discretionary power can be IMPLIED by the Housing Administrator or by the Court when omitted by Congress in the Lanham Act? Such omission by Congress is presumably intentional.

We do not believe that the *Lewis* case can properly be cited as *stare decisis* or intended to establish or perpetuate any such rule of law of implied powers in eminent domain on the records of this Court. If appellee's contention is correct then this case must be deemed also to reverse the rules of law in eminent domain as applied in each of the unchallenged authorities cited by Appellants in their opening brief herein, beginning on page 12, Sec. 3, Applicable Rules in Eminent Domain.

Appellee's brief herein evades, ignores and fails to make any attempt to answer the vital and basic issue of the law in the present case:

Did Congress in the Lanham Act, EXPRESSLY authorize the Housing Administrator to exercise his uncontrolled discretion in taking by *condemnation*, more than a temporary quantum of interest in private lands for merely the temporary wartime housing described in the Act?

It is significant that the Appellee's brief makes no attempt whatever to meet the issues of law presented in Appellants' brief. That Appellee's reasoning is obscure is illustrated by the "statement" beginning on page 4 of Appellee's brief, as follows:

"The court found, *inter alia*, that the Acting Commissioner of the Federal Public Housing Authority had *selected* the condemned lands for use in connection with public housing and that he did not act in bad faith or abuse his discretion in making his determination (Fdg. IV, R. 24)."

"The court concluded that the Commissioner acted within the scope of his power and authority in *selecting* the lands and that 'his determination that a fee interest in said lands should be taken as final'." (Our italics.)

Obviously this appeal does not involve any issue as to the Housing Commissioner's "*selection*" of the lands to be condemned.

In the case of *Warm Springs Irr. Dist. v. Pacific Live Stock Co.* (1921), 270 Fed. 560, the 9th Circuit Court stated the following rule in eminent domain:

"The authority to condemn will be strictly construed in favor of the owner of the property taken against the condemnor, and the authority must be strictly pursued."

This rule has become well established and the *Warm Springs* case has been frequently cited. Accordingly if the Lanham Act is to be strictly construed at least in so far as it applies to condemnations, we have in vain asked Appellee to quote the specific provision of the Lanham Act relied upon in claiming that the Lanham Act expressly delegated *discretionary powers* to the Administrator to acquire private land "at his discretion" or to take whatever quantum of interest "which *in his opinion* will be most advantageous to the Government." Such express provisions do not exist. They could not be found in the *Lewis* case, and cannot be found in the present case, although this is a vital issue now before this Court. Our repetition of this point of law is prompted only by an earnest desire for a specific ruling by the Court to which we believe the Appellants are entitled.

If the Appellee contends that the discretionary powers in question can be *implied*, he cannot cite any authority in eminent domain holding that such discretionary powers may be *implied*.

To the contrary the Courts have consistently followed the rule as stated in *Lewis on Eminent Domain*, Vol. I, Sec. 371:

"The exercise of the power of eminent domain being against common right, cannot be implied or inferred from vague or doubtful language, but must be given in express terms or by necessary implication. When the right to exercise the power can only be made out of argument and inference, it does not exist."

Authorities are cited in Appellants' opening brief herein consistent with the above rule. In connection with this basic point it is interesting to note that in the Tenn. Valley Authority Act, Congress left nothing to be implied but deemed it necessary to state expressly its grant to the Authority of the desired discretionary powers to condemn any interest in property that it "deems necessary for carrying out the purposes of this Act." No such provision was written by Congress into the Lanham Act.

It follows that this point should properly be clarified by the 9th Circuit Court in the present case, without curtailment of its judicial powers on the theory of *stare decisis* which Appellee contends was originated by its decision in the *Lewis* case.

B. ANALYSIS OF OPINION AND CONCLUSIONS IN THE LEWIS CASE, AND NEED FOR CLARIFICATION AND RESTATEMENT OF PRINCIPLES OF LAW IN EMINENT DOMAIN.

Inasmuch as the Appellee relies solely upon the *Lewis* case as being *stare decisis* in the present case, it seems necessary and proper to examine why it should not be held conclusive and binding upon the appellants herein, particularly those who were not parties to that case.

Analysis of statements of law in *Lewis* case.

The opinion of the Court in the *Lewis* case, 200 F. 2d 183 at page 184, headnote No. 1 is respectfully referred to for analysis.

It is submitted that the reasoning and conclusions as expressed in this paragraph are not clear:

“And it now is well established that the *government’s* power to condemn is coextensive with its power to purchase. . . . *Thus*, if the *Administrator* might purchase the fee simple title in property for use under the provisions of the Lanham Act, he may also acquire the fee simple title by condemnation proceedings.” (Our italics.)

Without question, the first sentence above is a correct statement of the power of the “*government*”, acting, however through Congress. But what about an agency of the government? The *Administrator*, the housing agency in this case, has no such inherent or constitutional power in eminent domain. Until Congress expressly delegates that power to him, and then only to the extent that Congress expressly and specifically so delegates the power, no such power can be *implied* to an Agency. (We refer to the citations of authority in our opening brief.) Was the decision in the *Lewis* case intended to establish such rule of implied power? We believe not.

When the statement in the opinion in question refers to the power of *Government* in eminent domain, and then concludes that the agency “thus” has the discretionary power to take the fee simple title for the temporary use described in the Lanham Act, the conditional “if” is apparently used as an affirmation and a conclusion. It would not follow that merely because the Government has the power, that the administrator likewise has the same power by implica-

tion. Are Appellants asking too much for a ruling on this point?

The statement further overlooks a serious question in eminent domain whether, under the authorization as enacted by Congress in the Lanham Act, it can be implied that the agency could even *purchase* the fee title absolute for merely a *temporary* housing use. It should be noted here that when these actions were filed, the agency actually elected *temporary* housing as the public use intended for temporary war workers within the narrow category stated in the Lanham Act. We know of no instances under the Lanham Act, other than the *Lewis* case and the present case, in which the permanent fee title was either purchased or condemned for *temporary* housing use.

In the paragraph of the opinion referred to as Headnotes 3-5 at page 185 in 200 F. 2d, indicates certain weight given to the circumstance that,

“The Lanham Act does not limit the quantum of interest in property which may be taken for public use.”

It is not clear and does not seem to follow that merely because the Lanham Act does not expressly “limit” the quantum of interest in land which may be acquired, that

“The Administrator was *thus* given *discretion* to *acquire* either the entire fee, or a lesser interest in the land.”

This is the *implied* discretionary power upon which the Appellee obviously relies, as the next paragraph

of the opinion states the implied conclusion that,

“Congress, by the Lanham Act, has empowered the Administrator *at his discretion* to acquire the land needed for defense housing by condemnation, and to take the interest which *in his opinion* will me most advantageous to the Government.” (Our italics.)

The statement of implied conclusions contained in this paragraph of the opinion relied upon two authorities therein cited. Both of the authorities, cited by Appellee, as well as *Simmonds v. U. S.* (9th Circuit), 199 Fed. 305, are cases in which discretionary powers had been *expressly delegated by Congress* to the Secretary of War, and which are not delegated by Congress in the Lanham Act to the housing agency. The discretionary power in question was not *implied* in these cases. It was expressly delegated by Congress.

We do not believe the Appellee can reasonably contend that the Lanham Act was intended by Congress to be as broad as the 2nd War Powers Act in the delegation of discretionary powers, else Congress would have so stated its intentions in the Act itself.

CONCLUSIONS.

It is respectfully urged that judgment in this case turns upon a determination of the applicability of one well established rule or principle of law in eminent domain, that the delegation of discretionary powers to an agency cannot be IMPLIED. The rule as supported by numerous authorities might be more fully stated as follows:

Where an Act of Congress (i.e. The Lanham Act) authorizing an Administrative Agency to take private lands by condemnation, *does not expressly* and unequivocally delegate to the Agency *discretionary power* to take whatever quantum of interest in said lands such Agency may choose to take, the quantum of taking is strictly limited to the temporary use as expressly described in the Act, and additional *discretionary power cannot be IMPLIED*.

If the Agency or the Court cannot *imply* such additional discretionary power by reading it into or between the lines of the particular Act of Congress in question, then the power to condemn an excess quantum such as the permanent fee title absolute for merely a temporary use does not exist.

It follows necessarily that the *Lewis* case or the doctrine of *stare decisis* cannot reverse the principles of law in eminent domain and create or imply such delegation of discretionary power unless the words are expressly and clearly used for all to read as part of the text of the Act of Congress relied upon by the agency claiming that power.

It is respectfully submitted that the judgment of the trial Court, herein condemning an excess quantum of interest in private lands, should be reversed.

Dated, San Francisco, California,

July 20, 1957.

SHERMAN & PETERS,

By DONOVAN O. PETERS,

Attorneys for Appellants.

No. 15470.
IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

ALVIN LOGAN,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF.

LAUGHLIN E. WATERS,

United States Attorney,

LOUIS LEE ABBOTT,

Assistant U. S. Attorney,

Chief, Criminal Division,

LEILA F. BULGRIN,

Assistant U. S. Attorney,

600 Federal Building,

Los Angeles 12, California,

Attorneys for Appellee, United States of America.

FILED

MAY 13 1957

PAUL P. O'BRIEN, CLERK



TOPICAL INDEX

	PAGE
I.	
Jurisdictional statement	1
II.	
The statute involved.....	3
III.	
Issue on appeal.....	3
IV.	
Argument	4
Conclusion	7

TABLE OF AUTHORITIES CITED

CASES	PAGE
Corollo v. Dutton, 63 F. 2d 7.....	5
Henry v. United, 215 F. 2d 639.....	4
Martinez, Torres v. United States, 220 F. 2d 740.....	4, 7
Parmagini v. United States, 42 F. 2d 721.....	4
Schoke v. United States, 200 F. 2d 928.....	6
Silverman v. United States, 59 F. 2d 636.....	5
United States v. Kranz, 86 Fed. Supp. 776.....	6
United States v. Krepper, 86 Fed. Supp. 862.....	6

STATUTES

United States Code, Title 21, Sec. 174	1, 3, 4, 5
United States Code, Title 28, Sec. 1291.....	2
United States Code, Title 28, Sec. 2255.....	2, 6, 7
United States Code, Title 28, Sec. 3231.....	1

No. 15470.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

ALVIN LOGAN,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF.

I.

Jurisdictional Statement.

The appellant, Alvin Logan, was indicted on December 14, 1955, in the United States District Court in and for the Southern District of California by the Grand Jury for said District for violations of Title 21, United States Code, Section 174. One count charged the defendant Logan, in essence, with concealing 84 grains of heroin and the second count charged said defendant with the sale of 84 grains of heroin. The District Court had jurisdiction of the cause under Section 3231 of Title 28, United States Code, which confers on the District Court's original jurisdiction "of all offenses against the laws of the United States."

The defendant Logan pleaded not guilty to Counts One and Two, in which he was named, and was tried before the above District Court on January 10, 11, and 12, 1956. On the latter date a verdict of guilty on both counts as to Alvin Logan was rendered. (Co-defendant Harold Delmus Golden, Jr., was also convicted on all four counts of the indictment.)

On January 23, 1956, the appellant Logan admitted his identity as to a prior narcotics conviction, pursuant to an information filed by the Government in the above case, and was sentenced to five years and \$100 on Count One of the indictment and to two years and \$100 on Count Two, the sentence on the latter count to run consecutively to that imposed on Count One.

On February 27, 1956, District Court Judge Peirson Hall, who tried this matter, heard the defendant Logan's motion to modify sentence filed on February 20, 1956, and denied the same.

On or about January 14, 1957, the said Court heard the defendant's motion under Section 2255, filed on December 7, 1956, which motion was also denied.

No appeal was ever taken by appellant Logan from the judgment of conviction, but a notice of appeal was filed from the denial of his motion under Section 2255.

This Court has jurisdiction under the provisions of Title 28, United States Code, Section 1291.

II.

The Statute Involved.

The indictment in this case was filed under the provisions of Section 174 of Title 21, United States Code, which provides in pertinent part as follows:

“Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States * * * contrary to law * * * or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported contrary to law, * * * shall be fined not more than \$2,000 and imprisoned not less than two, nor more than five years. For a second offense, the offender shall be fined not more than \$2,000 and imprisoned not less than five, nor more than ten years. * * *

“Whenever on trial for a violation of this subdivision the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury.”

III.

Issue on Appeal.

The only question on appeal in this matter is whether or not each count of the indictment states a separate public offense against the appellant.

IV.
Argument.

In opposing the defendant's motion before the District Court, the Government invited the attention of that Court to the case of *Henry v. United States*, 215 F. 2d 639 (9th Cir., Sept. 11, 1954), in which Judge Stephens of this Court stated:

"That the facilitation of transportation of and the sale of the heroin constitute two distinct offenses has been definitely settled by numerous authorities."

The case of *Torres Martinez v. United States*, 220 F. 2d 740 (1st Cir., March 28, 1955), was also cited to the Court below since it had been held there that Section 174 establishes multiple offenses.

"[4] 21 U. S. C. A. §174 in the disjunctive establishes multiple offenses. It punishes not merely the act of selling, but also the act of fraudulently or knowingly importing narcotic drugs contrary to law, and the separate offenses, after such importation, of receiving, concealment, buying the same, or in any manner facilitating the transportation, concealment or sale thereof, knowing them to have been imported contrary to law. The language in *Burton v. United States*, 1906, 202 U. S. 344, 377, 26 S. Ct. 688, 697, 50 L. Ed. 1057, is applicable here, that 'Congress intended to place its condemnation upon each distinct, separate part of every transaction coming within the mischiefs intended to be reached and remedied.' "

In *Parmagini v. United States*, 42 F. 2d 721 (9th Cir., July 28, 1930), this Honorable Court stated with respect

to the offenses set forth in Section 174 of Title 21, United States Code, that:

“Under this law concealment and sale are distinct offenses and therefore each act is punishable, although both occur in connection with a single transaction. * * * Therefore, consecutive sentences * * * for selling * * * and * * * for concealing * * * were proper.”

Since the law is well established that concealment and sale charged in separate counts under Section 174 state distinct offenses, it appears that the language of the Court in *Silverman v. United States*, 59 F. 2d 636, 638 (1st Cir., June 27, 1932), would be of interest here. This would be true although the two indictments consolidated for trial in that case were brought under different statutes for selling and concealing of narcotic drugs. The Court stated with respect to the question of proof of possession that:

“* * * Upon the issue of double punishment under these acts, the distinction between the act constituting the offense and evidence of the act must be kept in mind.”

In *Corollo v. Dutton*, 63 F. 2d 7, 8 (5th Cir., Feb. 9, 1933), the Court also stated in that connection:

“* * * Each count charges a separate and distinct offense. Each count requires to make it out, proof of a fact additional to that required to make out the offense under the others. Subdivision (f) of section 1 of the statute * * * [21 U.S.C.A. §174] does indeed provide that proof of possession alone makes a *prima facie* case under each count. * * * This subdivision does not define the sub-

stantive offenses; it deals with their proof. It merely makes proof of possession presumptive evidence, *prima facie*, of the facts essential to make out a case. While proof of possession operates with equal force under each count, the presumption which it raises is, as to each count, of the facts essential to conviction under it. It is to the statutes denouncing the offenses charged in each of the counts that we must look to determine whether the facts required in proof of each are the same."

In other words the fact that possession under the statute here in each case will make up a *prima facie* showing for the Government does not mean that the elements in each offense are the same.

If it could be said that the defendant is further attempting to raise the sufficiency of the evidence in connection with proof of the Government's case with respect to possession of the heroin involved, it is obvious that Section 2255 of Title 28, United States Code, is not an appropriate remedy to test the sufficiency of the evidence.

In the case of *Schobe v. United States*, 200 F. 2d 928 (9th Cir., April 5, 1955), this Honorable Court held that:

"It is only where a sentence is void or otherwise subject to collateral attack that section 2255 affords a remedy, and a motion under that section cannot function as an appeal."

See also:

United States v. Krepper, 86 Fed. Supp. 862 (U. S. D. C., D. N. J., Nov. 7, 1949);

United States v. Kranz, 86 Fed. Supp. 776 (U. S. D. C., D. N. J., Nov. 7, 1949).

It may also be of interest to this Court to consider the language of the Court of Appeals for the First Circuit in the *Torres Martinez* case, *supra*, in which it was said at page 743:

“If it be objected that count 2, as we have construed it, had the defect of being duplicitous, the answer is that such objection would come too late now, the defendant having made no motion under Rule 12(b) of the Federal Rules of Criminal Procedure, 18 U. S. C., and the court having imposed sentence upon the plea of guilty to count 2 in the form in which the grand jury handed it down. The plea of guilty was an admission of guilt of all the separate offenses predicated upon the distinct elements of the transaction set forth in count 2.”

It is obvious in this case that the appellant has not made any allegations which would have entitled him to be produced at the hearing where his motion under Section 2255 was denied.

Conclusion.

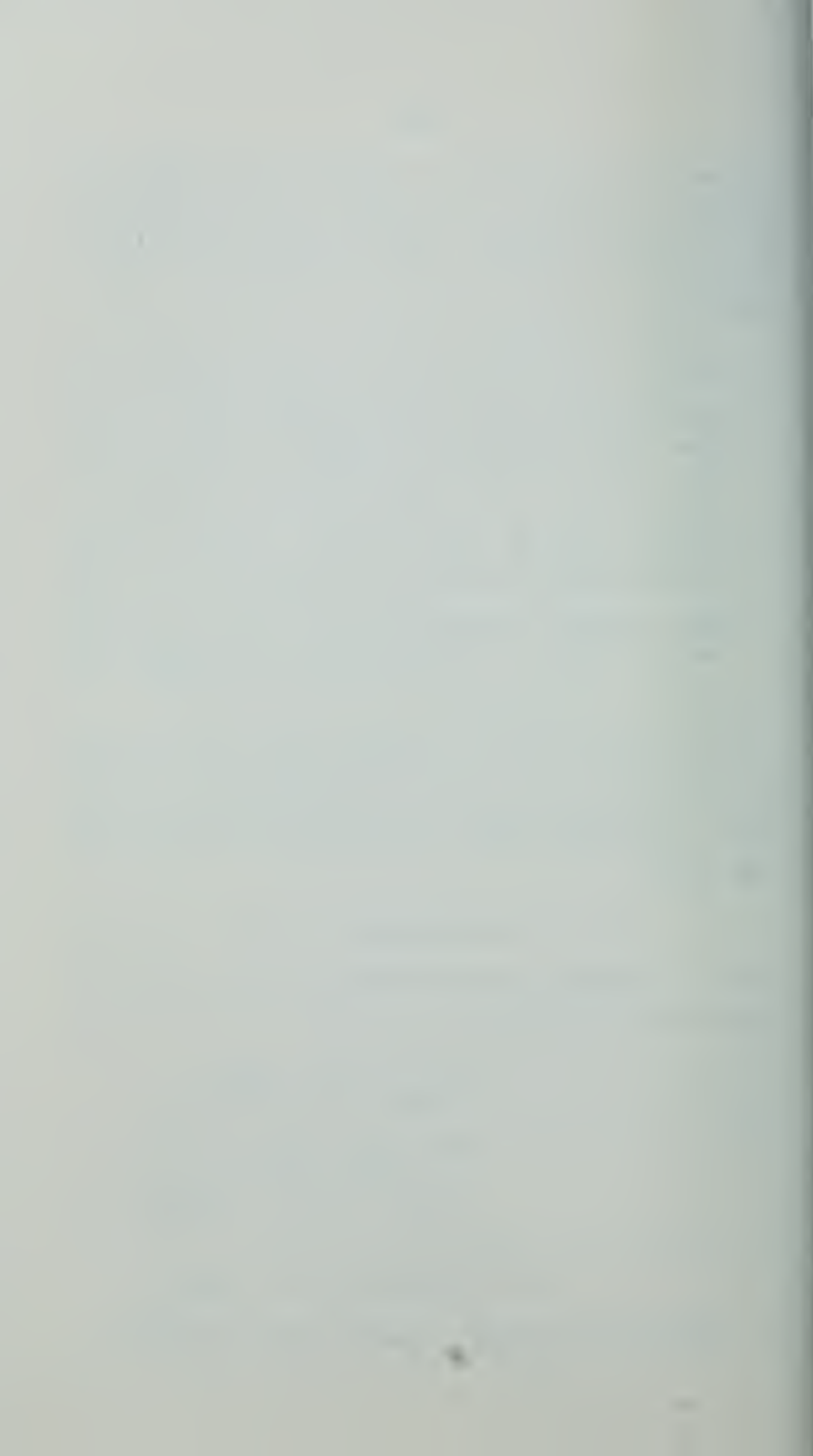
It is respectfully submitted that the action of the District Court below should be affirmed.

LAUGHLIN E. WATERS,
United States Attorney,

LOUIS LEE ABBOTT,
Assistant U. S. Attorney,
Chief, Criminal Division,

LEILA F. BULGRIN,
Assistant U. S. Attorney,

Attorneys for Appellee, United States of America.



No. 15471

United States
Court of Appeals
for the Ninth Circuit

UNITED STATES OF AMERICA,

Appellant,

vs.

SAFEWAY STORES, INC.,

Appellee.

Transcript of Record

Appeal from the United States District Court for the
Southern District of California,
Central Division.

FILE

JUN 11 1957

PAUL P. O'BRIEN, C



No. 15471

United States
Court of Appeals
for the Ninth Circuit

UNITED STATES OF AMERICA,

Appellant,

vs.

SAFEWAY STORES, INC.,

Appellee.

Transcript of Record

Appeal from the United States District Court for the
Southern District of California,
Central Division.



INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

	PAGE
Affidavit of Duncan, John K., Re Extension of Time, Filed Dec. 31, 1956.....	38
Order Re	39
Affidavit of Duncan, John K., and Request for Extension of Time, Filed Feb. 8, 1957.....	39
Order Re	41
Attorneys, Names and Addresses of.....	1
Certificate by Clerk.....	41
Indictment	3
Memorandum of Points and Authorities in Support of Motion to Dismiss Indictment, Filed August 24, 1956.....	7
Memorandum of Points and Authorities in Support of Motion to Dismiss Indictment, Filed October 1, 1956.....	23
Minute Order of the Court, October 16, 1956...	35
Notice of Appeal.....	37
Notice of Motion to Dismiss Indictment.....	5

INDEX	PAGE
Opposition to Motion to Dismiss Indictment...	18
Points and Authorities.....	19
Order Dismissing Indictment.....	36
Statement of Points on Which Appellant Intends to Rely on Appeal.....	44
Supplemental Points and Authorities in Opposition to Defendant's Motion to Dismiss Indictment	29

NAMES AND ADDRESSES OF ATTORNEYS

For Appellant:

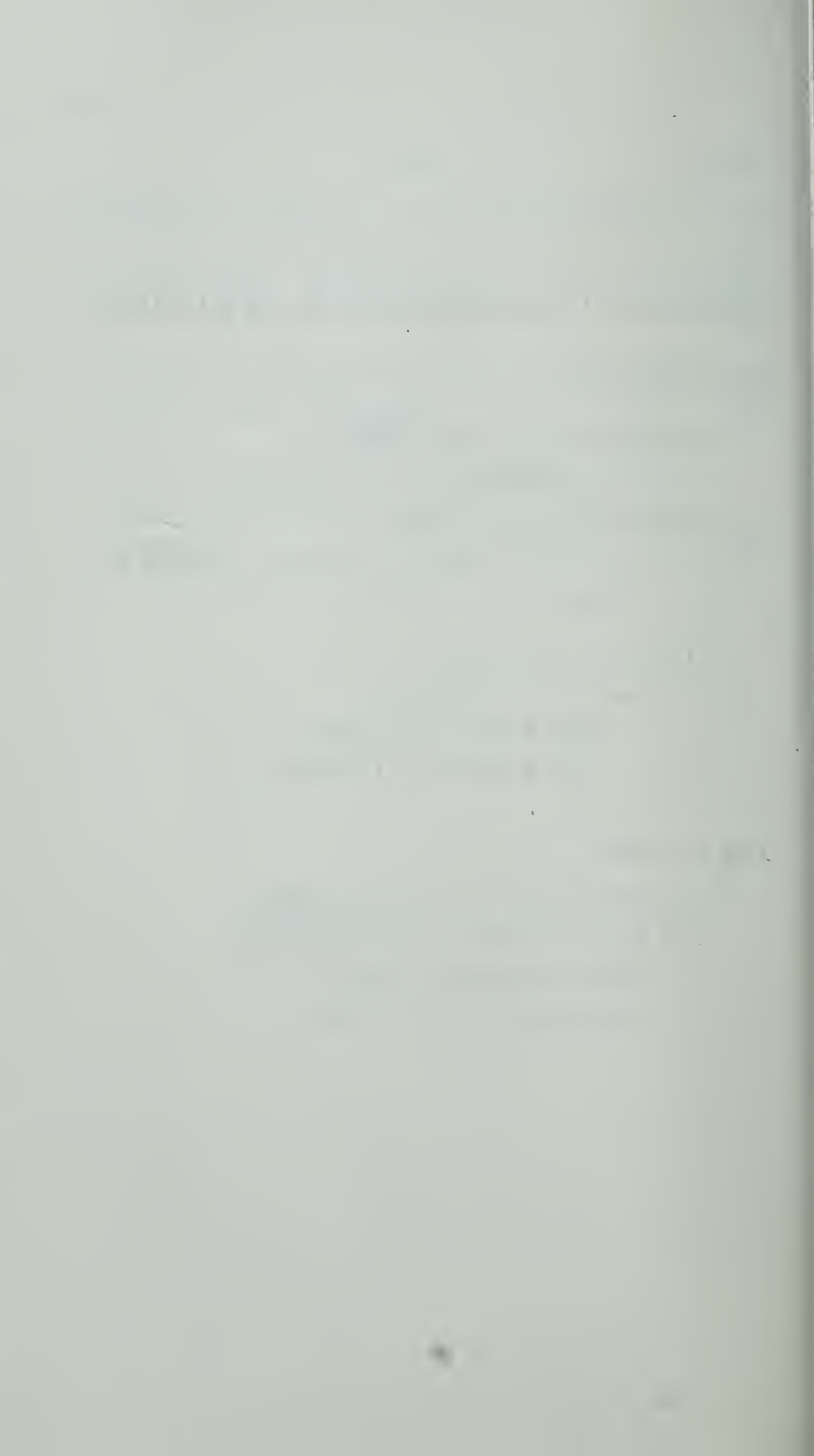
LAUGHLIN E. WATERS,
U. S. Attorney;

LOUIS LEE ABBOTT,
Asst. U. S. Attorney, Chief, Criminal Division;

JOHN K. DUNCAN,
Asst. U. S. Attorney,
600 Federal Building,
Los Angeles 12, California.

For Appellee:

GIBSON, DUNN & CRUTCHER,
JULIAN O. VON KALINOWSKI,
634 South Spring Street,
Los Angeles 14, California.



United States District Court for the Southern
District of California, Central Division

February, 1956, Grand Jury

No. 25141-CD

UNITED STATES OF AMERICA,

Plaintiff,

vs.

SAFEWAY STORES, INC., a Corporation,

Defendant.

INDICTMENT

[U.S.C., Title 21, Sec. 78—Shipment of Food
Products Not Properly Inspected.]

The grand jury charges:

Count One

[U.S.C., Title 21, Sec. 78.]

On or about January 5, 1956, the exact date being to the grand jury unknown, defendant Safeway Stores, Inc., a corporation organized and existing under the laws of the State of Maryland and maintaining a warehouse at 1925 East Vernon Avenue, Los Angeles, California, did unlawfully transport from Los Angeles, California, within the Central Division of the Southern District of California, to the Safeway Store at 1300 East Charleston Boulevard, Las Vegas, Nevada, a quantity of meat food products of cattle and swine, to wit: forty-eight

21¼-ounce Kold Kist steaks, twelve 16-ounce Kold Kist sirloin tips, twelve 16-ounce packages of Kold Kist chili con carne, six 1-pound packages of scrap-ple, twelve 9-ounce tamales, six 14-ounce packages of enchiladas, six 11¼-pound packages of tamales, and six 15-ounce packages of beef tacos, which [2*] had not been inspected, examined, and marked "Inspected and passed" as required by law. [3]

Count Two

[U.S.C., Title 21, Sec. 78.]

On or about January 13, 1956, the exact date being to the grand jury unknown, defendant Safeway Stores, Inc., a corporation organized and existing under the laws of the State of Maryland and maintaining a warehouse at 1925 East Vernon Avenue, Los Angeles, California, did unlawfully transport from Los Angeles, California, within the Central Division of the Southern District of California, to the Safeway Store at 1300 East Charleston Boulevard, Las Vegas, Nevada, a quantity of meat food products of cattle and swine, to wit: 256 pounds of cured beef briskets, twelve 9-ounce tamales, twelve 8-ounce packages of chili, six 14-ounce packages of enchiladas, six 11¼-pound packages of tamales, six 15-ounce packages of beef tacos, twelve 6-ounce packages of Taco Snax, and six 1-pound packages of enchiladas with refried beans, which had not been inspected, examined, and marked "Inspected and passed" as required by law.

*Page numbering appearing at foot of page of original Certified Transcript of Record.

A True Bill,

/s/ GEORGE DIETZLER,
Foreman.

/s/ LAUGHLIN E. WATERS,
United States Attorney.

[Endorsed]: Filed July 25, 1956. [4]

[Title of District Court and Cause.]

NOTICE OF MOTION TO
DISMISS INDICTMENT

To the United States of America and to Laughlin
E. Waters and John K. Duncan, Its Attorneys:

Please Take Notice that the defendant, Safeway Stores, Inc., a corporation, on Monday, September 10, 1956, at the hour of 2:00 p.m. on said day, or as soon thereafter as counsel may be heard, in the courtroom of the Honorable Thurmond Clarke, Judge of the above-named court, in the Federal Building at Los Angeles, California, will move that the indictment and each count thereof be dismissed on the following grounds:

1. Each count of the indictment does not state facts sufficient to constitute an offense against the United States in that it affirmatively appears on its face that defendant comes within the exception to the statute upon which the alleged offense is based, exempting retail dealers in meat and meat products supplying their [5] customers.

2. Each count of the indictment does not sufficiently inform the defendant of the nature and cause of the accusation in that:

(a) It fails to specifically allege that defendant does not come within the statutory exception exempting retail dealers in meat and meat products supplying their customers.

(b) It does not appear thereon whether Safeway Stores, Inc., is being charged as a retail dealer in meat and meat products supplying its customers, with the offense created by the statute or otherwise.

3. The indictment was not filed within a reasonable time after its return.

Said motion will be based on the papers, files and indictment in this action, this Notice of Motion and the Memorandum of Points and Authorities in support of said Motion served and filed concurrently herewith.

Dated: August 23, 1956.

GIBSON, DUNN & CRUTCHER,
JULIAN O. VON
KALINOWSKI,

By /s/ JULIAN O. VON
KALINOWSKI,
Attorneys for Defendant,
Safeway Stores, Inc.

Receipt of Copy acknowledged.

[Endorsed]: Filed August 24, 1956. [6]

[Title of District Court and Cause.]

MEMORANDUM OF POINTS AND AUTHORITIES
IN SUPPORT OF MOTION TO DISMISS
INDICTMENT

Introductory Statement

Each count of the indictment is based upon the alleged violations by defendant, Safeway Stores, Inc., of Section 78 of the Meat Inspection Act (21 U.S.C., § 71-91) in the transportation of certain non-federally inspected processed meat products between Safeway's Los Angeles, California, warehouse and its Las Vegas, Nevada, retail store.

Defendant has moved to dismiss the indictment on two basic substantive legal grounds, each of which relates to each count of the indictment:

(1) The indictment affirmatively appears on its face that defendant comes within the exception to the statute upon which the alleged offense is based and therefore has not committed an offense against the United States. [8]

(2) The defendant is not sufficiently informed of the nature and cause of the accusation for the reason, (a) that there is no specific allegation negating the statutory exemption exempting retail dealers in meat and meat products supplying their customers, and, (b) it does not appear whether defendant is being charged as such retail meat products dealer with the offense created by the statute or otherwise.

The primary question involved is whether the indictment affirmatively shows on its face that defendant, Safeway Stores, Inc., is within the exception to the statute and, therefore, could not have committed the statutory offense alleged. If that question is answered in the affirmative, the Motion to Dismiss must be granted. If not, two other questions are presented by the Motion, each, of which, if answered in favor of defendant's contentions, would likewise require a dismissal.

Italics throughout this Memorandum are ours unless otherwise noted.

I.

Each Count of the Indictment Alleges Facts Which Shows That the Defendant Comes Within the Exceptions Provided in the Statute Upon Which the Alleged Offense Is Based, Exempting Retail Dealers in Meat and Meat Products Supplying Their Customers.

Specifically the indictment charges that defendant transported from its warehouse in Los Angeles to its store in Las Vegas meat products which had not been inspected, examined, and marked " 'Inspected and Passed' as required by Law." In order to determine whether a statutory offense has been committed reference must therefore be made to the requirements of the law with respect to inspection of meat products and transportation of those products in interstate commerce.

Section 78 of the Meat Inspection Act makes it unlawful to transport in interstate commerce meat or meat food products which [9] have not been inspected, examined and marked "Inspected and Passed" as required by the provisions of the Meat Inspection Act. Section 91 of the same Act (21 U.S.C. § 91) specifically excepts from the provisions of the Act requiring inspection "retail dealers in meat and meat food products supplying their customers." The statutory language is as follows:

"The provisions of Sections 71-91 of this Title, requiring inspection to be made by the Secretary of Agriculture shall not apply to animals slaughtered by any farmer on the farm and sold and transported in interstate or foreign commerce, nor to retail butchers and retail dealers in meat and meat food products, supplying their customers: * * *."

21 U.S.C. § 91.

Accordingly by the very terms of the statute upon which each count of this indictment is based, a retail dealer in meat and meat products transporting those products in interstate commerce for sale to its customers, is not required to obtain federal inspection of the meat products.

Analyzing the allegations of the indictment, it is apparent that this defendant has not violated the statute: Thus from the statement in the indictment that the defendant was transporting the meat food products from its warehouse to its store coupled with the well-known fact of which the court may

take judicial notice, that Safeway Stores, Inc., is a national retail grocery chain outlet, the court may conclude that the defendant was acting as a "retail dealer in meat and meat food products supplying their customers." This being true, the defendant is exempt from the inspection requirements of the Act. It therefore appears on the face of the indictment that these meat food products were not "required by law" to be inspected. Since the indictment does not charge the defendant with a crime under the statute the indictment should be dismissed. [10]

Rule 12(b)(1), Fed. Rules Crim. Proc.

II.

The Indictment and Each Count Thereof Does Not Sufficiently Inform the Defendant of the Nature and Cause of the Accusation in That: (a) It Fails to Specifically Allege That Defendant Does Not Come Within the Statutory Exception Exempting Retail Dealers in Meat and Meat Products Supplying Their Customers, and (b) It Fails to Show Whether Safeway Stores, Inc., Is Being Charged as a Retail Dealer in Meat and Meat Products Supplying Its Customers, With the Statutory Offense or Otherwise. The Indictment Must Therefore Be Dismissed.

We have already shown that the indictment is fatally deficient because it affirmatively shows that the defendant is within the provisions of the exemption to the statutory crime. However, even if

this were not the case, the indictment must fail because of its failure to sufficiently inform the defendant of the nature and cause of the accusation.

It is axiomatic that an indictment which does not sufficiently inform the defendant of the nature and cause of the accusation is fatally deficient and must be dismissed. That the indictment here involves violation of this fundamental principle is manifest from the foregoing analysis of the provisions of the statute upon which the alleged crime is based.

A. The Indictment Fails to Specifically Allege That Defendant Does Not Come Within the Statutory Exemption Relating to Retail Dealers in Meat and Meat Products Supplying Their Customers.

It is well settled that where a statute defining an offense contains an exception which is so incorporated with language defining the offense that the ingredients of offense cannot be accurately and [11] clearly described if the exception is omitted, an indictment founded on such a statute must allege enough to show that the accused is not within the exception. In the leading case of *United States vs. Cook* (1872), 84 U.S. 168, 21 L. Ed. 538, the court set forth the above rule as follows:

“Where a statute defining an offense contains an exception, in the enacting clause of the statute, which is so incorporated with the language defining the offense that the ingredients of the offense can-

not be accurately and clearly described if the exception is omitted, the rules of good pleading require that an indictment founded upon the statute must allege enough to show that the accused is not within the exception; but if the language of the section defining the offense is so entirely separable from the exception that the ingredients constituting the offense may be accurately and clearly defined without any reference to the exception, the pleader may safely omit any such reference, as the matter contained in the exception is matter of defense and must be shown by the accused. *Steel vs. Smith*, 1 Barn. & Ald. 99; Arch. Cr. Pl., 15th Ed. 54.

“Offenses created by statute, as well as offenses at common law, must be accurately and clearly described in an indictment, and if they cannot be, in any case, without an allegation that the accused is not within an exception contained in the statute defining the offense, it is clear that no indictment founded upon the statute can be a good one which does not contain such an allegation, as it is universally true that no indictment is sufficient if it does not accurately and clearly allege all the ingredients of which the offense [12] is composed. *Rex vs. Mason*, 2 T. R. 581.”

United States vs. Cook,

84 U.S. 168, 173-174, 21 L. Ed. 538, 539.

See also:

Hale vs. United States,

(4th Cir. 1937), 89 F. 2d 578.

“It is elementary that every ingredient of the crime must be charged in the bill, a general reference to the provisions of the statute being insufficient. *The Schooner Hoppet & Cargo vs. United States*, 7 Cranch, 389, 3 L. Ed. 380; *Pettibone vs. United States*, 148 U.S. 197, 13 S.Ct. 542, 37 L. Ed. 419; *United States vs. Standard Brewery*, 251 U.S. 210, 40 S.Ct. 139, 64 L. Ed. 229. And ‘if the negation of an exception in the enacting clause of a statute is essential to accurately describe the offense, then the accusations of the indictment must show that the accused is not within the exception.’ *Weare vs. United States* (C.C.A. 8th), 1 F. (2d) 617, 620; *United States vs. Cook*, 17 Wall. 168, 174, 21 L. Ed. 538; *Ledbetter vs. United States*, 170 U.S. 606, 611, 18 S.Ct. 774, 42 L. Ed. 1162; 31 C.J. 720.”

Hale vs. United States, 89 F. 2d 578, 579. It is clear that when the court speaks of an exception in the “enacting clause” of the statute it does not intend to distinguish the section defining the offense from a subsequent section in the same act. The court in *United States vs. Cook*, *supra*, said in this regard:

“Cases have also arisen, and others may readily be supposed, where the exception, though in a subsequent clause or section, or even in a subsequent statute, is, nevertheless, clothed in such language, and is so incorporated as an amendment with the words antecedently employed to define the offense, that it [13] would be impossible to frame the actual

statutory charge in the form of an indictment with accuracy, and the required certainty, without an allegation showing that the accused was not within the exception contained in the subsequent clause, section or statute. Obviously such an exception must be pleaded, as otherwise the indictment would not present the actual statutory accusation, and would also be defective for the want of clearness and certainty. *State vs. Abbey*, 29 Vt. 66; 1 Bish. Cr. Proc. 2d Ed. § 639, n. 3.”

United States vs. Cook,

84 U.S. 168, 174-175, 21 L. Ed. 538, 539-540.

In *United States vs. Wood* (D.C.N.J. 1907), 159 F. 187, the defendant was charged with violating a statute making it unlawful to bring into the United States any Chinese person “in contravention of the provisions of this Act.” In quashing the indictment the Court quoted from *United States vs. Cook*, *supra*, and said:

“Here, then, we find an exception in the enacting clause of the statute. The crime is not fully defined by that clause; but we are compelled to look elsewhere to determine what constitutes the crime therein referred to. In such cases good pleading requires that the indictment should allege enough to show that the accused is not within the exception.”

United States vs. Wood,

159 F. 187-188.

It should be noted that Section 78 refers to meat or meat food products which have not been inspected “in accordance with the terms of §71-94, inclusive, of this title,” thereby necessitating that reference be made to the other sections of the Act to determine if inspection of the meat transported is required under such a statute. It is manifest therefore that the indictment is fatally deficient because it does not allege enough to show that the accused [14] is not within the exceptions in the Act relating to inspection.

We should call to the court's attention the case of United States vs. Mendelsohn (D.C.N.J., 1940), 32 F. Supp. 622, one of the few cases relating to the statutory provisions here involved.¹ This case appears at first blush to be contrary to our contention under this Point II.² However, we do not believe that it is controlling here. It is uncertain from the opinion whether the facts alleged in the indictment there involved are similar to the indictment before this court, particularly as to the charge of the alleged offense. Moreover, we submit that the decision is erroneous if it be interpreted to hold that Section 78 of the Act does not incorporate by specific language as a part of the offense the exemptions of Section 91 of that Act. In this connection, as we

¹That the statutory offense here involved has been little used appears manifest from the dearth of authority relating to the statute.

²This case is not applicable to our Point I hereof as it did not involve that question.

have previously pointed out, Section 78 specifically refers to meat and meat products which have not been inspected as required by Sections 71-94 of the Act. Therefore the exemption by specific language must be referred to in establishing the elements of the statutory offense. Finally, of course, the decision of the New Jersey District Court is not binding in this court.

B. Each Count of the Indictment Is Uncertain in That It Does Not Show Whether Defendant Safeway Stores, Inc., Is Being Charged as a Retail Dealer in Meat and Meat Products Supplying Its Customers With the Statutory Offense, or Otherwise.

The indictment is likewise uncertain for the additional reason that it does not state whether defendant, Safeway Stores, Inc., [15] is being charged as a retail dealer in meat supplying its customers with the offense prescribed by the Act, or as a slaughterer, packer, canner or meat processor.

It is an oft-stated rule that the indictment must set forth the facts so distinctly as to advise the accused of the charge and give him a fair opportunity to prepare his defense, so particularly that a conviction or acquittal would bar another prosecution for the same offense, and so clearly that the court may determine whether the facts stated support a conviction.

See: Sutton vs. United States (5 Cir. 1946), 157 F. 2d 661, p. 663; United States vs. Lembo (3 .

Cir. 1950), 184 F. 2d 411; *Berger vs. United States* (1934), 295 U.S. 78, 81-83, 79 L. Ed. 1314.

The indictment violates this basic constitutional principle in its failure to set forth the character of Safeway's activities allegedly in violation of the Statutory Offense. Therefore the indictment does not contain sufficient facts to enable the defendant to be advised of the charge against it and prepare its defense accordingly.

III.

The Indictment Was Not Filed Within a Reasonable Time After Its Return by the Grand Jury

The indictment shows on its face that it was returned by the February, 1956, Grand Jury. Yet it was not filed until July 25, 1956, some 7 months later. It is submitted that this is unreasonable time in the filing of the charge against this defendant and contravenes Rule 48 (b) of the Federal Rules of Criminal Procedure, and the Sixth Amendment to the United States Constitution guaranteeing a "speedy trial" in all criminal cases. Accordingly the indictment should be dismissed.

Conclusion

For each and all of the foregoing reasons, it is respectfully [16] urged that the indictment be dismissed.

Respectfully submitted,

GIBSON, DUNN & CRUTCHER,
JULIAN O. VON
KALINOWSKI,

By /s/ JULIAN O. VON
KALINOWSKI,
Attorneys for Defendant,
Safeway Stores, Inc.

Receipt of Copy acknowledged.

[Endorsed]: Filed August 24, 1956. [17]

[Title of District Court and Cause.]

OPPOSITION TO MOTION TO DISMISS IN-
DICTMENT AND POINTS AND AUTHOR-
ITIES

The government opposes defendant's motion to dismiss the indictment on the following grounds:

1. The indictment states an offense against the United States in that defendant does not come within the statutory exception providing for the exemption of certain persons from the operation of the penal statute.

2. The indictment sufficiently informs defendant of the nature and cause of the accusation.

3. The indictment was filed within a reasonable time after its return.

LAUGHLIN E. WATERS,
United States Attorney;

LOUIS LEE ABBOTT,
Assistant U. S. Attorney,
Chief, Criminal Division;

/s/ JOHN K. DUNCAN,
Assistant U. S. Attorney, Attorneys for Plaintiff,
United States of America. [19]

Points and Authorities

I.

The Indictment States Sufficient Facts to
Constitute an Offense Against the United States

The defense motion has failed to set out a complete text of United States Code 21, Section 91. The part omitted reads as follows:

“The Secretary of Agriculture is authorized to maintain the inspection in said sections provided for at any slaughtering, meat-canning, salting, packing, rendering, or similar establishment notwithstanding this exception, and that the persons operating the same may be retail butchers and retail dealers or farmers; and where the Secretary of Agriculture shall establish such inspection then the provisions of said sections shall apply notwithstanding this exception.”

It is clear that where the Secretary of Agriculture establishes inspection procedures the exceptions provided for in Section 91 are of no effect. The case of *United States vs. Lainoff*, 101 Fed. Supp. 675 (1951, D.C. E.D., Mo.) is clearly in point. There defendant asserted that he came within the exception as a retail dealer. The Court states at page 677:

“The statute does grant an exemption to retail dealers but the exemption is conditioned on the absence of the establishment of inspection service for such retail dealers. There is not an absence of such inspection regulation. The facts therefore destroy the exemption relied on by the defendant.”

In the instant case there is not an absence of inspection regulations. 9 C.F.R., Section 2.1 (1949 edition) provides as follows: [20]

“§2.1 Establishments requiring inspection.

“Every establishment in which cattle, sheep, swine, or goats are slaughtered for transportation or sale as articles of interstate or foreign commerce, or in which meat, meat byproducts, or meat food products of, or derived from, cattle, sheep, swine, or goats are, wholly or in part, canned, cooked, cured, smoked, salted, packed, rendered, or otherwise prepared for transportation or sale as articles of interstate or foreign commerce, which are capable of being used as food for man, shall have inspection under the regulations in this subchapter, except as expressly exempted by Part 4 of this subchapter.”

The regulations also provide that those establishments seeking the statutory exemption must make application for same. 9 C.F.R., Section 4.1 provides as follows:

“§4.1 Application for inspection or exemption.

“(a) The proprietor or operator of each establishment of the kind specified in § 2.1 of this subchapter shall make application to the chief of division for inspection or for exemption from inspection.”

Pursuant to the above authority, the government submits that defendant does not come within the exception provided for in 21 U.S.C., Section 91 as contended in defendant's motion.

II.

The Indictment Sufficiently Informs the Defendant
of the Nature and Cause of the Accusation

Defendant's motion alleges that it is necessary for the [21] government to specifically allege in the indictment that the defendant does not come within the statutory exemption. Defendant relies heavily upon the case of *United States vs. Cook*, 84 U.S. 168 (1872). It should be noted primarily that that case held against the contention here asserted by defendant. In that case the question was whether or not it was necessary for the government to allege in the indictment that the defendant came within an ex-

ception to the statute of limitations. The court held that it was not necessary to so allege for the reason that the language of the statute defining the offense was so entirely separable from the exception that the ingredients constituting the offense could be accurately and clearly defined without any reference to the exception. The Court went on to state that the only real question in these cases is whether the exception is so incorporated with the substance of the clause defining the offense as to constitute a material part of the description of the acts, omission, or other ingredients which constitute the offense. In the event that the offense may be accurately and clearly defined without any reference to the exception, the pleader may safely omit any such reference as the matter contained in the exception is a matter of defense and must be shown by the accused.

It is the position of the government in the instant case that the indictment alleges all the necessary ingredients contained in Title 21, United States Code, Section 78. It is also the position of the government that even if the rule cited by the defendant were a correct rule of law it would not be applicable in this case because of the fact that the exception contained in Title 21, Section 91 is "an illusory exception." Hence, in no case would it be necessary to plead such exception. [22]

III.

The Indictment Was Filed Within a Reasonable
Time After Its Return

This point as asserted by defendant is entirely without merit. The indictment was returned by the grand jury and filed on July 25, 1956. The reference to the February, 1956, Grand Jury contained in the indictment means simply that the grand jury sitting on July 25, 1956, was impaneled as a grand jury in February of 1956.

Respectfully submitted,

LAUGHLIN E. WATERS,
United States Attorney;

LOUIS LEE ABBOTT,
Assistant U. S. Attorney,
Chief, Criminal Division;

JOHN K. DUNCAN,
Assistant U. S. Attorney, Attorneys for Plaintiff,
United States of America.

Receipt of copy acknowledged.

[Endorsed]: Filed September 10, 1956. [23]

[Title of District Court and Cause.]

MEMORANDUM OF POINTS AND AUTHORITIES
IN SUPPORT OF MOTION TO DISMISS
INDICTMENT

In its opposition to defendant's Motion to Dismiss Indictment, the government makes two basic con-

tentions, neither of which is tenable. They are: (1) the indictment states sufficient facts to constitute an offense against the United States in that defendant does not come within the statutory exception, and (2) the indictment sufficiently informs defendant of the nature and cause of the accusation.

I.

The Indictment Does Not State an Offense Against the United States as It Is Clear That Defendant Is Within the Statutory Exception

Defendant contends that it is exempt under 21 U.S.C. § 91, as a "retail dealer," from the inspection provisions [25] of §§ 71-91.¹ The government now contends that defendant is not exempt as § 91 authorizes the Secretary of Agriculture to maintain inspection at certain establishments even though operated by retail dealers, that such inspection procedure has been established by the Secretary of Agriculture, and that the exception provided by § 91 is therefore of no effect. The basis for this contention is a proviso in § 91 authorizing the Secretary of Agriculture to maintain the inspection provided for in §§ 71-91 at establishments where certain op-

¹"The provisions of Sections 71-91 of this title, requiring inspection to be made by the Secretary of Agriculture shall not apply to animals slaughtered by any farmer on the farm and sold and transported in interstate or foreign commerce, nor to retail butchers and retail dealers in meat and meat food products, supplying their customers: * * *"

erations on meat or meat products are performed.² However, the proviso relied on by the government is clearly inapplicable to the instant proceeding. The only charge in each count of the indictment is that defendant "did unlawfully transport" certain meat or meat products from its warehouse to its store. There is no allegation in either count of the indictment that defendant operated any "slaughtering, meat canning, salting, packing, rendering, or similar establishment," the only establishments at which the Secretary of Agriculture is authorized to establish inspections. Thus, there is no indication that defendant was engaged in any of the activities which would authorize the Secretary of Agriculture to maintain inspection procedures. Since defendant is not alleged to have engaged in any of these activities, defendant is obviously within the exception provided by § 91 hereinbefore referred to. It is, therefore, apparent that defendant has not violated 21 U.S.C., § 78. [26]

The case of *United States vs. Lainoff* (E.D. Mo. 1951) 101 F. Supp. 75 is clearly distinguishable from the instant case. The defendant in that case was engaged in activities covered by regulations established by the Secretary of Agriculture. How-

²"The Secretary of Agriculture is authorized to maintain the inspection in Sections 71-91 of this title provided for at any slaughtering, meat canning, salting, packing, rendering, or similar establishment notwithstanding this exception, and that the persons operating the same may be retail butchers and retail dealers or farmers; * * *"

ever, in the instant case, no inspection regulations are involved as there is no allegation that this defendant engaged in any of the activities which the Secretary of Agriculture is authorized to regulate by inspection.

As shown above, § 91 not only fails to support the government's contention, but conclusively shows that defendant is excepted from the coverage of §§ 71-91. Similarly, the regulation relied on by the government, 9 C.F.R., § 2.1, also shows that defendant is not covered by inspection regulations. This regulation covers establishments in which animals are slaughtered or in which meat or meat products are "canned, cooked, cured, smoked, salted, packed, rendered, or otherwise prepared for transportation or sale." However, there is no allegation in either count of the indictment that the defendant operated any establishment in which any such activities took place. In both counts, it is merely alleged that defendant "did unlawfully transport" meat products from its warehouse to its store. Thus, it is clear on its face that this regulation does not apply in the instant case. Furthermore, the scope of this regulation can be no greater than the power given the Secretary of Agriculture by § 91 to establish inspection and, for the reasons previously set forth, the alleged acts of defendant are not within the scope of that power.

The government has failed to show that defendant is not exempt under § 91. Similarly, the government has failed to show that the Secretary of Agriculture

had any power to regulate the acts of defendant here in question or that the Secretary of Agriculture established any regulation seeking to control such acts. [27] It appears on the face of the indictment that the meat food products here in question were not "required by law" to be federally inspected. Therefore, since the indictment does not charge defendant with a crime under the statute, the indictment should be dismissed.

II.

The Indictment Does Not Sufficiently Inform Defendant of the Nature and Cause of the Accusation.

Defendant contends that the indictment is defective in two respects: (1) it fails to specifically allege that defendant does not come within the statutory exemption relating to retail dealers in meat and meat products supplying their customers, and (2) it does not show whether defendant is being charged as a retail dealer in meat and meat products supplying its customers, or otherwise. In answer to these contentions, the government asserts merely that if the offense may be defined without reference to the exception, the government may omit any such reference as the exception is a matter of defense and must be shown by the accused. However, as shown by defendant in its earlier Points and Authorities, § 78, the section which defendant allegedly violated, specifically refers to §§ 71-94 of Title 21. Therefore, the very section in question requires a reference to some twenty-four sections of Title 21. Defendant

submits that it is obvious that the exception is so incorporated with the substance of the clause defining the offense as to constitute a material part of the description of the act, omission, or other ingredient constituting the offense. It is impossible to define the offense clearly and accurately without referring to the exception.

The government alternately contends that if defendant is right in its contention that the indictment is defective for failing to specifically allege that defendant does not come within [28] the exemption, that rule would not be applicable because the exception contained in § 91 is "an illusory exception." While the government does not attempt to explain why it is "an illusory exception," a reading of the government's Points and Authorities indicates that the government considers § 91 to be "an illusory exception" because the Secretary of Agriculture may establish inspection of certain activities and thus allegedly destroy the exception. However, the government fails to recognize that the power given the Secretary of Agriculture to establish inspection of certain establishments is not as broad as the exception granted to retail dealers by § 91. As hereinbefore pointed out, § 91 does not authorize the Secretary of Agriculture to establish regulations concerning the inspection of all retail dealers in meat, but merely to inspect establishments where certain activities are engaged in, whether they are engaged in by retail dealers or not.

For both the foregoing reasons, the indictment does not contain sufficient facts to enable the defendant to be advised of the charge against it and prepare its defense accordingly.

Conclusion

For each and all of the foregoing reasons it is respectfully urged that the indictment be dismissed.

Respectfully submitted,

GIBSON, DUNN & CRUTCHER,
JULIAN O. VON
KALINOWSKI,

By /s/ JULIAN O. VON
KALINOWSKI,
Attorneys for Defendant,
Safeway Stores, Inc.

Receipt of copy acknowledged.

[Endorsed]: Filed October 1, 1956. [29]

[Title of District Court and Cause.]

SUPPLEMENTAL POINTS AND AUTHORITIES
IN OPPOSITION TO DEFENDANT'S
MOTION TO DISMISS INDICTMENT

In its motion to dismiss indictment defendant has continually asserted two basic contentions. They are (1) that defendant is within the statutory exception provided for in Title 21, United States Code, Section 91; (2) the indictment does not sufficiently

inform defendant of the nature and cause of the accusation.

LAUGHLIN E. WATERS,
United States Attorney;

LOUIS LEE ABBOTT,
Assistant U. S. Attorney,
Chief, Criminal Division.

/s/ JOHN K. DUNCAN,
Assistant U. S. Attorney, Attorneys for Plaintiff,
United States of America. [31]

Points and Authorities

I.

Defendant Is Not Within the Statutory Exception

Defendant contends in its motion to dismiss indictment that the Secretary of Agriculture has no power to regulate the type of activities in which the defendant is engaged. Defendant relies strongly on the language of Title 21, United States Code, Section 91, stating that the Secretary of Agriculture has power to maintain inspection at any slaughtering, meat canning, salting, packing, rendering, or similar establishment, and also states that the exemption granted to retail dealers is broader than the power given the Secretary to regulate. In short, defendant contends that the exemption given to retail dealers can be negative by the Secretary only where the dealer engages in slaughtering, meat canning, salting, packing, or rendering.

In determining the validity of this proposition, the Government submits that the reason for the exception created by Section 91 must be considered. Why did the Congress create an exception through the conduct proscribed in Section 78 and then state that the Secretary of Agriculture could negative this exception by maintaining inspection. The Government submits that the Congress realized that certain retail dealers in meat food products would require inspection of meat products shipped in interstate commerce. The Congress realized that some retail operations would by their nature require inspection, hence the Secretary was given the power to establish such inspection as he deemed necessary in establishments where meat food products were handled. [32]

Defendant has ignored the import of the words "similar establishment" in Section 91. The Secretary has taken the view that they created a broad power of inspection, as manifested by the regulations. 9 C.F.R., Section 2.1, provides in pertinent part as follows:

"Every establishment in which * * * meat by-products * * * are, wholly or in part, canned, cooked, cured, smoked, salted, packed, rendered, or otherwise prepared for transportation or sale as articles of interstate or foreign commerce * * * shall have inspection * * *"

Defendant argues in its motion that the Secretary has established no regulations seeking to control the

type of conduct in which defendant is engaged. It would appear that in making this contention defendant has ignored the clear meaning of the language underlined above. It is apparent from this language that the Secretary of Agriculture intended that all meat products intended for transportation in interstate commerce should be inspected, and that exemptions from inspection were to be allowed only in the manner prescribed in 9 C.F.R., Section 4.1.

Defendant has argued orally that the government has not established that inspection procedures were established at defendant's warehouse. Defendant has again ignored the clear language in the regulations; 9 C.F.R., Section 4.1 makes it clear that the establishments preparing meat products for interstate shipment must apply for inspection or exemption. Defendant has not only failed to apply for inspection, it has failed to apply for the exemption which it now so strongly asserts. [33] The cases are too numerous to cite holding that a defendant must exhaust his administrative remedies before he is entitled to judicial review of his position.

The government submits that defendant is not entitled to claim the statutory exemption for the reasons stated above.

II.

The Indictment Sufficiently Informs Defendant of the Nature and Cause of the Accusation

Defendant contends in its motion to dismiss indictment that it is necessary for the government to

allege in the indictment that the defendant does not come within the statutory exemption relating to retail dealers. Defendant mentioned briefly the case of *United States vs. Mendelsohn*, (D.C.N.J.) 32 Fed. Supp. 622 (1940) and attempted to distinguish it from the present case with the general statement that it is not clear from the opinion whether the facts alleged there were similar to the instant indictment. The fact is that the *Mendelsohn* case presents precisely the same issue that defendant now asserts. In that case the defendant was charged with violation of the same statute as is the instant defendant. The defendant moved to dismiss the indictment on the ground that the government had failed to allege that defendant was not within the exemption contained in the statute. The defendant there asserted the same cases as controlling as are here asserted, principally the case of *United States vs. Cook*, 84 U.S. 168. The court in a well-reasoned opinion held that the elements of the offense as set out in Title 21, United States Code, Section 78, were fully set forth in the indictment and that if defendant came within the exemption contained in Section 91 his remedy was not by motion to quash but rather that it was incumbent upon him to set it up as a matter of defense. [34]

Defendant also contends that the indictment is defective in that it does not state whether defendant is charged as a retail dealer in meat and meat products supplying its customers or otherwise. The government submits that the indictment is in the

language of the state which states simply that no person, firm or corporation shall transport in interstate commerce meat food products that have not been inspected and marked. If defendant is not sufficiently informed of the nature of the charge as stated in the indictment, its remedy is by way of a bill of particulars and not by way of a motion to dismiss.

For the above-stated reasons the government submits that the motion to dismiss should be denied.

Respectfully submitted,

LAUGHLIN E. WATERS,
United States Attorney;

LOUIS LEE ABBOTT,
Assistant U. S. Attorney,
Chief, Criminal Division.

/s/ JOHN K. DUNCAN,
Assistant U. S. Attorney, Attorneys for Plaintiff,
United States of America.

Affidavit of service by mail attached.

[Endorsed]: Filed October 8, 1956. [35]

[Title of District Court and Cause.]

MINUTES OF THE COURT

October 16th, 1956

Present: Hon. Thurmond Clarke, District Judge;
U. S. Att'y, by Ass't U. S. Att'y: No appearance.

Counsel for defendant: No appearance.

Proceedings:

Ruling on submitted matter:

It Is Hereby Ordered that the motion of the Defendant heretofore heard and submitted on Sept. 10, 1956, is granted.

Counsel for the Defendant is directed to prepare and file dismissal within ten days.

Counsel notified.

JOHN A. CHILDRESS,
Clerk;

By E. J. FISHER,
Deputy Clerk. [37]

United States District Court for the Southern
District of California, Central Division

No. 25141—CD

UNITED STATES OF AMERICA,

Plaintiff,

vs.

SAFEWAY STORES, INC., a Corporation,

Defendant.

ORDER DISMISSING INDICTMENT

This cause came on to be heard on Defendant's Motion to Dismiss the Indictment, and each count thereof, and the Court having heard the argument of counsel, having read the Points and Authorities submitted by Plaintiff and Defendant, having taken the matter under submission, and being fully advised, it is

Ordered, that the Defendant's Motion be, and it hereby is granted, and that the Indictment, and each count thereof, be and the same hereby is dismissed.

Dated: October 24, 1956.

/s/ THURMOND CLARKE,
United States District Judge.

Approved as to form:

/s/ JOHN K. DUNCAN.

[Endorsed]: Filed October 24, 1956. [38]

[Title of District Court and Cause.]

NOTICE OF APPEAL

(Pursuant § 3731, Title 18, U.S.C.; Rule 37, Fed. Rules of Crim. Procedure, and § 1291, Title 28, U.S.C.)

The appellant is the United States of America. Appellant's attorney is Laughlin E. Waters, United States Attorney, by Louis Lee Abbott, Assistant United States Attorney, Chief of Criminal Division, and John K. Duncan, Assistant United States Attorney. The address of appellant and appellant's attorney is 600 Federal Building, Los Angeles 12, California.

This appeal is from a judgment and order of the Honorable Thurmond Clarke, United States District Judge, entered on October 24, 1956, dismissing the indictment in the herein case.

The judgment appealed from is that certain order and judgment of the Honorable Thurmond Clarke, United States District Judge, who granted the motion of the defendant to dismiss the herein indictment. [39]

The above appellant, the United States of America, hereby appeals to the United States Court of Appeals for the Ninth Circuit, from the above-stated judgment granting the motion to dismiss the herein indictment.

Dated: November 21, 1956.

LAUGHLIN E. WATERS,
United States Attorney;

LOUIS LEE ABBOTT,

Assistant U. S. Attorney,

Chief of Criminal Division;

/s/ JOHN K. DUNCAN,

Assistant U. S. Attorney.

[Endorsed]: Filed November 21, 1956. [40]

[Title of District Court and Cause.]

AFFIDAVIT

United States of America,

Southern District of California—ss.

John K. Duncan, being first duly sworn, deposes and says:

That he is at all times herein stated and pertinent to the trial of this case, an Assistant U. S. Attorney for the Southern District of California, a member of the bar of this honorable court; that as a part of his duties he was assigned to oppose the appellee's Motion to Dismiss Indictment;

That he has had correspondence with the Department of Justice relative to the prosecution of the herein appeal and that the Department of Justice has requested an extension of time to docket the record on appeal herein from the 31st day of December, 1956, to and including the 11th day of February, 1957, upon the [41] ground that such additional time is necessary for the convenience of the

Government in resolving whether or not the appeal should be further prosecuted.

/s/ JOHN K. DUNCAN.

ORDER

Good cause having been shown therefor,

It Is Hereby Ordered that the time for docketing the record on appeal is extended from the 31st day of December, 1956, to and including the 11th day of February, 1957.

Dated: December 31, 1956.

/s/ WM. C. MATHES,
United States District Judge.

Affidavit of service by mail attached.

[Endorsed]: Filed December 31, 1956. [42]

[Title of District Court and Cause.]

AFFIDAVIT AND REQUEST FOR EXTENSION OF TIME TO DOCKET RECORD ON APPEAL

United States of America,
Southern District of California—ss.

John K. Duncan, being first duly sworn, deposes and says:

That he is at all times herein stated and pertinent to the trial of this case an Assistant United States

Attorney for the Southern District of California, a member of the bar of this honorable court; that as a part of his duties he was assigned to oppose the appellee's Motion to Dismiss Indictment;

That he has had correspondence with The Department of Justice relative to the prosecution of the herein appeal and that The Solicitor General authorized appeal by telegram on February 5, 1957; [44]

That it will be impossible to docket the record on appeal by February 11, 1957, the date to which the time for docketing the record on appeal has heretofore been extended by order of the United States District Court for the Southern District of California.

Accordingly, it is requested that additional time be granted to docket the record on appeal; to wit, up to and including March 11, 1957.

/s/ JOHN K. DUNCAN.

Subscribed and Sworn to before me this 8th day of February, 1957.

JOHN A. CHILDRESS,
Clerk, United States District Court, Southern District of California.

By /s/ H. L. COFFEY,
Deputy.

ORDER

Good cause having been shown therefor,

It Is Hereby Ordered that the time for docketing the record on appeal is extended from the 11th day of February, 1957, to and including the 11th day of March, 1957.

Dated: February 8, 1957.

/s/ THURMOND CLARKE,

United States District Judge.

[Endorsed]: Filed February 8, 1957. [45]

[Title of District Court and Cause.]

CERTIFICATE BY CLERK

I, John A. Childress, Clerk of the above-entitled Court, hereby certify that the items listed below constitute the transcript of record on appeal to the United States Court of Appeals for the Ninth Circuit, in the above-entitled cause:

A. The foregoing pages numbered 1 to 47, inclusive, containing the original:

Indictment;

Notice of Motion to Dismiss Indictment;

Memorandum of Points & Authorities in Support of Motion to Dismiss Indictment;

Opposition to Motion to Dismiss Indictment and Points & Authorities;

Memorandum of Points & Authorities in Support of Motion to Dismiss Indictment;
Supplemental Points & Authorities in Opposition to Defendant's Motion to Dismiss Indictment;
Order Dismissing Indictment;
Notice of Appeal;
Affidavit of John K. Duncan, Asst. U. S. Attorney in Support of Request for Extension of Time to Docket Record on Appeal; & Order Thereon;
Affidavit of John K. Duncan, Asst. U. S. Attorney and Request for Extension of Time to Docket Record on Appeal & Order Thereon;
Stipulation as to Contents of Record; (Designation of Record);

and a full, true and correct copy of the Minutes of the Court on October 16, 1956;

I further certify that my fee for preparing the foregoing record amounting to \$1.60, has not been paid by appellant.

Witness my hand and the seal of said District Court, this 7th day of March, 1957.

JOHN A. CHILDRESS,
Clerk;

By /s/ CHARLES E. JONES,
Deputy. [46]

[Endorsed]: No. 15471. United States Court of Appeals for the Ninth Circuit. United States of America, Appellant, vs. Safeway Stores, Inc., Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed March 8, 1957.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

United States Court of Appeals
for the Ninth Circuit

No. 15471

UNITED STATES OF AMERICA,

Appellant,

vs.

SAFEWAY STORES, INC., a Corporation,

Appellee.

STATEMENT OF POINTS ON WHICH AP-
PELANT INTENDS TO RELY ON AP-
PEAL

Appellant will rely on the following points in the prosecution of the appeal from the Order Dismissing Indictment in the above-entitled cause:

1. The Indictment is sufficient to state an offense against the United States.
2. The Trial Court erred in dismissing the Indictment.

Respectfully submitted,

LAUGHLIN E. WATERS,
United States Attorney;

LOUIS LEE ABBOTT,
Assistant U. S. Attorney,
Chief, Criminal Division;

/s/ JOHN K. DUNCAN,
Assistant U. S. Attorney, Attorneys for Appellant,
United States of America.

[Endorsed]: Filed May 10, 1957.

No. 15471

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant,

vs.

SAFEWAY STORES, INC., a corporation,

Appellee.

Appeal From the United States District Court for the
Southern District of California, Central Division.

BRIEF AND ARGUMENT FOR APPELLANT.

LAUGHLIN E. WATERS,
United States Attorney,

LOUIS LEE ABBOTT,
*Assistant U. S. Attorney,
Chief, Criminal Division,*

JOHN K. DUNCAN,
Assistant U. S. Attorney,

PETER JAY HUGHES,
Assistant U. S. Attorney,

600 Federal Building,
Los Angeles 12, California,

Attorneys for Appellant.

FILED

JUL 17 1957

PAUL P. O'BRIEN, CLERK

TOPICAL INDEX

	PAGE
Jurisdictional statement	1
Statement of the case.....	2
Statutes involved	4
The regulations of the secretary.....	7
Assignments of error.....	10
Issues	10
Argument	11
It is not necessary to allege in the indictment that appellee does not come within the exception to the statute as set forth in Section 91 of Title 21 of the United States Code....	11
It is unnecessary to allege in the indictment that appellee is or is not a retail dealer in meat and meat products supplying its customers	13
It does not appear from the face of the indictment that Safe- way is exempt from the requirements of the statute.....	15
1. Nothing contained in the indictment brings Safeway within the exemption provisions of Section 91.....	15
2. The exemption provisions of Section 91 were never intended to apply to the type of business conducted by Safeway	18
3. Exemptions covering the transportation of uninspected meat in interstate commerce is not automatic. The granting of such an exemption is discretionary with the Secretary of Agriculture and must be requested by the retail dealer	19
4. The exemption provisions of Section 91 are not applic- able to the facts alleged in the indictment.....	21
Conclusion	25

TABLE OF AUTHORITIES CITED

CASES	PAGE
Anderson v. United States, 215 F. 2d 84.....	14
Brown v. United States, 222 F. 2d 293.....	14
Burnett v. United States, 222 F. 2d 426.....	14
Cohen v. United States, 178 F. 2d 588.....	14
Edwards v. United States, 312 U. S. 473.....	11
Evans v. United States, 153 U. S. 584.....	11
Ginsberg & Sons v. Popkin, 285 U. S. 204.....	24
Hamilton v. Rathbone, 175 U. S. 414.....	23
Heasley v. United States, 218 F. 2d 86.....	14
Helvering v. City Banks Co., 296 U. S. 85.....	23
Lake County v. Rollins, 130 U. S. 662.....	23
Las Vegas Merchants Plumbers Assn. v. United States, 210 F. 2d 732.....	21
Market Co. v. Hoffman, 101 U. S. 112.....	24
McDonald v. Thompson, 305 U. S. 263.....	24
McKelvey v. United States, 260 U. S. 353.....	11
National Labor Relations Board v. Greensboro Coca-Cola Bottling Co., 180 F. 2d 840.....	24
Northern Pacific Railroad Co. v. Lewis, 162 U. S. 366.....	11
O'Connor v. Armour Packing Co., 158 Fed. 241, 15 L. R. A. (N. S.) 812.....	4
Osaka Shosen Line v. United States, 300 U. S. 98.....	23
Piedmont & Northern Ry. v. Comm'n, 286 U. S. 299.....	24
Reynolds v. United States, 225 F. 2d 123.....	13
Shapiro v. United States, 335 U. S. 1.....	24
Stokes v. United States, 157 U. S. 187.....	11
Sunshine Coal Co. v. Adkins, 310 U. S. 381.....	24
Taylor v. United States, 142 F. 2d 808.....	11
United States v. J. R. Watkins Co., 16 F. D. R. 229.....	21

	PAGE
United States v. Lattimore, 215 F. 2d 847.....	21
United States v. Mendelsohn, 32 Fed. Supp. 622.....	12, 13
United States v. Raynor, 302 U. S. 540.....	23
United States v. Universal Bottle Service, 85 Fed. Supp. 622....	18

STATUTES

Meat Inspection Act of 1907.....	4, 24
United States Code, Title 21, Sec. 71	4, 20
United States Code, Title 21, Sec. 72	4, 20
United States Code, Title 21, Sec. 73.....	20
United States Code, Title 21, Sec. 74.....	20
United States Code, Title 21, Sec. 75.....	5
United States Code, Title 21, Sec. 76.....	20
United States Code, Title 21, Sec. 77.....	20
United States Code, Title 21, Sec. 78 .....1, 2, 3, 5, 13, 14, 15, 20	
United States Code, Title 21, Sec. 80.....	20
United States Code, Title 21, Sec. 83.....	20
United States Code, Title 21, Sec. 88.....	6
United States Code, Title 21, Sec. 89	7, 20
United States Code, Title 21, Sec. 91 (Pocket Part).....	
.....6, 7, 10, 12, 13, 15, 16, 17, 18, 19, 21, 22	
Federal Rules of Criminal Procedure, Rule 7	14, 15

MISCELLANEOUS

9 Code of Federal Regulations, Sec. 2.1.....	8
9 Code of Federal Regulations, Sec. 4.1.....	8
9 Code of Federal Regulations (Pocket Part), Sec. 4.3.....	8
9 Code of Federal Regulations, Sec. 25.10.....	9



No. 15471

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant,

vs.

SAFEWAY STORES, INC., a corporation,

Appellee.

**Appeal From the United States District Court for the
Southern District of California, Central Division.**

BRIEF FOR UNITED STATES OF AMERICA.

Jurisdictional Statement.

This is an appeal by the United States from an Order of the District Court for the Southern District of California, dismissing both Counts of the Indictment against defendant which Indictment was brought under the provisions of Section 78 of Title 21, United States Code. The violations charged were alleged to have been acts initiated in Los Angeles County, California, within the Central Division of the Southern District of California, and ending in Las Vegas, Nevada. The jurisdiction of the District Court was based upon Sections 3231 and 3237 of Title 18, United States Code. This Court has jurisdiction to entertain the instant appeal and to review the proceedings leading to the Order Dismissing the Indictment against defendant by reason of the provisions of Section 3731 of Title 18, United States Code.

Statement of the Case.

On July 25, 1956, the Federal Grand Jury at Los Angeles, California, returned a True Bill to a two count indictment against the defendant Safeway Stores, Inc., a corporation. (Hereinafter referred to as "Safeway.") The indictment charged a violation of Title 21, Section 78 of the United States Code, namely the transportation in interstate commerce of meat food products of cattle and swine which had not been inspected, examined and marked, "Inspected and Passed." The first count covered the transportation of forty-eight 2¼-ounce Kold Kist steaks; twelve 16-ounce Kold Kist sirloin tips; twelve 16-ounce packages of Kold Kist chili con carne; six 1-pound packages of scrapple; twelve 9-ounce tamales; six 14-ounce packages of enchiladas; six 1¼-pound packages of tamales and six 15-ounce packages of beef tacos from Los Angeles to Las Vegas, Nevada.

The second count covered the transportation of 256 pounds of cured beef briskets; twelve 9-ounce tamales; twelve 8-ounce packages of chili; six 14-ounce packages of enchiladas; six 1¼-pound packages of tamales; six 15-ounce packages of beef tacos; 12 6-ounce packages of Taco Snax, and six 1-pound packages of enchiladas with refried beans.¹ [R. 3-5.]

¹The full text of the two counts in the indictment are as follows: Count One (U. S. C. Title 21, Sec. 78). On or about January 5, 1956, the exact date being to the grand jury unknown, defendant Safeway Stores, Inc., a corporation organized and existing under the laws of the State of Maryland and maintaining a warehouse at 1925 East Vernon Avenue, Los Angeles, California, did unlawfully transport from Los Angeles, California, within the Central Division of the Southern District of California, to the Safeway Store at 1300 East Charleston Boulevard, Las Vegas, Nevada, a quantity of meat food products of cattle and swine, to wit: forty-eight 2¼-ounce Kold Kist steaks, twelve 16-ounce Kold Kist sir-

On August 23, 1956, the defendant filed a motion to dismiss the indictment alleging that the defendant came within exceptions to the statute and that the indictment failed to inform the defendant of the nature and cause of the accusation.² [R. 5-6.] Memorandums in support of and in opposition to the motion were filed by the respective parties and the court heard argument on the motion on October 16, 1956. [R. 7-34.]

On the foregoing date a minute order was entered granting defendant's motion to dismiss. [R. 35.] This was followed on October 24, 1956, by a formal order

loin tips, twelve 16-ounce packages of Kold Kist chili con carne, six 1-pound packages of scrapple, twelve 9-ounce tamales, six 14-ounce packages of enchiladas, six 1¼-pound packages of tamales, and six 15-ounce packages of beef tacos, which had not been inspected, examined, and marked "Inspected and passed" as required by law.

Count Two (U. S. C., Title 21, Sec. 78). On or about January 13, 1956, the exact date being to the grand jury unknown, defendant Safeway Stores, Inc., a corporation organized and existing under the laws of the State of Maryland and maintaining a warehouse at 1925 East Vernon Avenue, Los Angeles, California, did unlawfully transport from Los Angeles, California, within the Central Division of the Southern District of California, to the Safeway Store at 1300 East Charleston Boulevard, Las Vegas, Nevada, a quantity of meat food products of cattle and swine, to wit: 256 pounds of cured beef briskets, twelve 9-ounce tamales, twelve 8-ounce packages of chili, six 14-ounce packages of enchiladas, six 1¼-pound packages of tamales, six 15-ounce packages of beef tacos, twelve 6-ounce packages of Taco Snax, and six 1-pound packages of enchiladas with refried beans, which had not been inspected, examined, and marked "Inspected and passed" as required by law.

²As a third ground the defendant alleged that the indictment was not filed within a reasonable time after its return. [R. 6.] Defendant contended that inasmuch as the indicting Grand Jury was the February 1956 Grand Jury and that the indictment was not returned until July 25 that there was undue delay. After it was pointed out in plaintiff's memorandum opposing the motion that the Grand Jury was impaneled in February 1956 and that the indictment was actually returned on July 25, 1956 and filed on the same day [R. 23] this point was no longer urged by defendant.

granting defendant's motion and dismissing the indictment. [R. 36.] Notice of Appeal was filed on November 21, 1956. [R. 37.] Neither the minute order nor the formal order of October 24, 1956, set forth the reasons or basis for the court's decision and order.

Statutes Involved.

Sections 71 to 93, inclusive, of Title 21 of the United States Code are commonly referred to as the "Meat Inspection Act of 1907." The purpose of the act is to prevent traffic in diseased and unwholesome meats. *O'Connor v. Armour Packing Co.*, 158 Fed. 241, 15 L. R. A. (N. S.) 812 (5 Cir., 1908). Section 71 of Title 21 states in part:

"For the purpose of preventing the use in interstate or foreign commerce of meat and meat food products which are unsound, unhealthful, unwholesome, or otherwise unfit for human food, the Secretary of Agriculture, at his discretion, may cause to be made . . . an examination and inspection of all cattle, sheep, swine and goats before they shall be allowed to enter into any slaughtering, packing, meat-canning, rendering or similar establishment . . ."

Section 72 of Title 21 provides for a post mortem examination of all carcasses *and parts thereof*

"of all cattle, sheep, swine and goats to be prepared for human consumption at any slaughtering, meat-canning, salting, packing, rendering, or similar establishment in any State, Territory or the District of Columbia *for transportation or sale* as articles of interstate or foreign commerce" (Emphasis supplied.)

Carcasses and parts thereof found to be sound and wholesome and fit for human food are required to be marked, stamped, tagged or labeled as "Inspected and passed."

Section 75 of Title 21 requires that where any meat or meat food products that have previously been inspected and marked "Inspected and passed" are ". . . placed or packed in any can, pot, tin, canvas or other receptacle . . ." a label shall be attached to the container or covering under the supervision of the inspector stating that the contents have been "Inspected and passed."

The indictment in this case charges violations of Section 78 of Title 21. This section provides:

"No person, firm, or corporation shall transport or offer for transportation, and no carrier of interstate or foreign commerce shall transport or receive for transportation from one State or Territory or the District of Columbia to any other State or Territory or the District of Columbia or to any place under the jurisdiction of the United States or to any foreign country, any carcasses or parts thereof, meat or meat food products thereof which have not been inspected, examined and marked as 'Inspected and passed' in accordance with the terms of sections 71 to 94, inclusive, of this title, and with the rules and regulations prescribed by the Secretary of Agriculture."

Section 88 of Title 21 sets forth the penalty that shall be imposed for a violation of Sections 71 to 94, inclusive, of the act.³

Certain exemptions provided in the act are applicable to "farmers," "retail butchers" and "retail dealers." Only those provisions applicable to "retail dealers" concern us in this case. A "retail dealer" is defined in Section 91 of Title 21, as follows:

"A 'retail dealer' means any person, partnership, association, or corporation *chiefly engaged in selling meat or meat food products to consumers only* except that the Secretary of Agriculture, at his discretion, may permit any retail dealer to transport in interstate trade or foreign commerce to consumers and meat retailers in any one week not more than five carcasses of cattle; twenty-five carcasses of calves; twenty carcasses of sheep; twenty-five carcasses of lambs; ten carcasses of swine; twenty carcasses of goats, or twenty-five carcasses of goat kids, or the equivalent of fresh meat therefrom, and to transport in interstate or foreign commerce to consumers *only* meat and *meat food products* which have been salted, cured, canned, or prepared as sausage, lard, or other meat food products which have not been inspected, examined, and marked as 'Inspected and passed' in accordance with the terms of sections 71-91 of this

³The full text of Section 88 is as follows: "Any person, firm, or corporation, or any officer or agent of any such person, firm or corporation, who shall violate any of the provisions of sections 71 to 94, inclusive, of this title shall be deemed guilty of a misdemeanor and shall be punished on conviction thereof by a fine of not exceeding \$10,000 or imprisonment for a period of not more than two years, or by both such fine and imprisonment, in the discretion of the court."

title, and Acts supplemental thereto, and with the rules and regulations prescribed by the Secretary of Agriculture.” (Emphasis supplied.)

After defining a “farmer,” “retail butcher” and “retail dealer,” Section 91 states:

“The provisions of sections 71-91 of this title, requiring inspection to be made by the Secretary of Agriculture shall not apply to animals slaughtered by any farmer on the farm and sold and transported in interstate or foreign commerce, nor to retail butchers and retail dealers in meat and meat food products *supplying their customers* . . .

“. . . AND PROVIDED FURTHER, The Secretary of Agriculture is authorized to maintain the inspection in sections 71-91 of this title provided for any slaughtering, meat canning, salting, packing, rendering, or similar establishment notwithstanding this exception, and that the persons operating the same may be retail butchers and retail dealers or farmers; and where the Secretary of Agriculture shall establish such inspection *then the provisions* of said sections *shall apply* notwithstanding this exception.”⁴ (Emphasis supplied.)

The Regulations of the Secretary.

Section 89 of Title 21 authorizes the Secretary of Agriculture to adopt rules and regulations for carrying out the provisions of the Meat Inspection Act as follows: “. . . said Secretary of Agriculture shall, from time to time, make such rules and regulations as are necessary

⁴The full text of Section 91 deals largely with exemptions applicable to farmers and “retail butchers.” We have quoted in full those parts of this section dealing with “retail dealers” in which exemption the defendant would fall, if any.

for the efficient execution of the provisions of said sections, . . .” The rules and regulations relating to meat inspection prescribed by the Secretary are found in the Code of Federal Regulations, Title 9,, Subchapter A, Parts 1 to 29, inclusive. Those sections dealing with inspections and exemptions, which are pertinent to this proceeding, are as follows:

“§2.1. *Establishments requiring inspection.* Every establishment in which cattle, sheep, swine, or goats are slaughtered for transportation or sale as articles in interstate or foreign commerce, or in which meat, meat byproducts, or meat food products of, or derived from, cattle, sheep, swine, or goats are, wholly or in part, canned, cooked, cured, smoked, salted, packed, rendered, or otherwise *prepared for transportation or sale* as articles of interstate or foreign commerce, which are capable of being used as food for man, *shall have inspection* under the regulations in this subchapter, *except as expressly exempted* by Part 4 of this subchapter.” (Emphasis supplied.) (9 C. F. R. Sec. 2-1.)

“§4.1. *Application for inspection or exemption.* (a) The proprietor or operator of each establishment of the kind specified in §2.1 of this subchapter shall make application to the chief of the division for inspection or for exemption from inspection.” (9 C. F. R. Sec. 4.1.)

“§4.3. *Exemption.* (a) Retail butchers and retail dealers in product, supplying their customers as provided in the Meat Inspection Act, upon making application, pursuant to §4.1, may be exempted from inspection. To each one so exempted a numbered certificate of exemption shall be furnished. No certificate of exemption shall be issued unless all of the

premises on which the products are prepared and handled are maintained in a sanitary condition . . .”

“§25.10. *Exemption; certificate for shipment of uninspected product.* When any product which has not been inspected and passed under the provisions of this subchapter is offered for transportation from one State or Territory or the District of Columbia to or through another State, or Territory or the District of Columbia or to any place under the jurisdiction of the United States, or to a foreign country, by any retail butcher or retail dealer who holds a certificate of exemption issued in compliance with the provisions of this subchapter, the carrier shall require and such retail butcher or retail dealer shall make and deliver to the carrier a certificate in duplicate in the following form.”⁵

5 “Date....., 195

Name of carrier.....
 Shipper
 Point of Shipment.....
 Consignee
 Destination
 Number of exemption certificate.....

I hereby certify that I am a retail butcher or a retail dealer in meat or meat products; that the following described meat or meat food products are offered for shipment in interstate or foreign commerce under a certificate of exemption issued to me by the United States Department of Agriculture, and that at this date they are sound, healthful, wholesome and fit for human food, and contain no preservative or coloring matter or other substance prohibited by the Federal meat inspection regulations.

Kind of product

Amount of weight

.....

.....

.....
 Signature of Shipper

.....
 Address of Shipper”

Assignments of Error.

Appellant sets forth the following assignments of error:

1. The indictment is sufficient to state an offense against the United States.
2. The Trial Court erred in dismissing the indictment.

Issues.

In the District Court defendant contended that the indictment did not state facts sufficient to constitute an offense because it affirmatively appeared on the face of the indictment that defendant comes within the exception to the statute exempting retail dealers in meat and meat products supplying its customers. It was also argued that the indictment did not sufficiently inform the defendant of the nature and cause of the accusation because it failed (1) to allege that the defendant did not come within the statutory exception and (2) because it did not specify whether defendant was being charged as a retail dealer or otherwise.

From the foregoing it appears that the issues on appeal are:

1. Is it essential that the allegations in the indictment negative the exemptions provided in Section 91 of the Meat Inspection Act?
2. Must the indictment allege that appellee is or is not a retail dealer in meat and meat products supplying its customers?
3. Does it affirmatively appear on the face of the indictment that appellee is exempt from the requirements of the statute?

ARGUMENT.

I.

It Is Not Necessary to Allege in the Indictment That Defendant Does Not Come Within the Exception to the Statute as Set Forth in Section 91 of Title 21 of the United States Code.

It has long been established that it is unnecessary to allege affirmatively in an indictment or criminal information that a defendant does not fall within the exemptions provided in a criminal statute. The rule was concisely phrased in *McKelvey v. United States*, 260 U. S. 353, 357 (1922), where the court stated:

“By repeated decisions it has come to be a settled rule in this jurisdiction that an indictment or other pleading founded on a general provision defining the elements of an offense, or a right conferred, need not negative the matter of an exception made by a proviso or other distinct clause, whether in the same section or elsewhere and that it is incumbent on one who relies on such an exception to set it up and establish it.” (Cases cited.)

In so holding the Supreme Court sustained the decision of this Court in the *McKelvey* case. See also *Edwards v. United States*, 312 U. S. 473, 482 (1941); *Northern Pacific Railroad Co. v. Lewis*, 162 U. S. 366, 376 (1895); *Stokes v. United States*, 157 U. S. 187, 191 (1894); and *Evans v. United States*, 153 U. S. 584, 590 (1893).

In the case of *Taylor v. United States*, 142 F. 2d 808, 814 (C. A. 9, 1944), this Court again applied the established rule in a case involving the Emergency Price Control Act of 1942 when it said: “. . . it was not a burden of the Government to negative in the information exceptions which might exculpate the accused from liability under the Act.”

The same identical issue was raised before the District Court for the District of New Jersey in the case of *United States v. Mendelsohn*, 32 Fed. Supp. 622, 624. In holding that it was unnecessary to negative the exemptions provided in 21 U. S. C. 91, the court said:

“In the act before us each section except section 78 which defines the crime and section 91 which states the exemption has to do with the mechanics of inspection. The offense is completely defined in section 78, and the exception is nowise intertwined therein.

* * * * *

“In the case before us the elements of the offense as defined in section 78 are fully set forth in the indictment. If the defendant comes within the subsequent exemption contained in section 91, his remedy is not by way of a motion to quash the indictment, but it is incumbent upon him to set up his defense and establish it.”

Safeway has attempted in its pleadings before the District Court to distinguish the *Mendelsohn* case by asserting that it is uncertain from the opinion whether the facts alleged in the indictment there involved were similar to the indictment brought against defendant herein. The facts in that case were essentially the same as in the instant case. It involved an identical situation. The violation charged was the same as was the defendant's allegation that the exemption provided in Section 91 must be negated in the indictment. The only difference is that in the *Mendelsohn* case it was admitted without reservation that the defendant was a retail dealer, which admis-

sion is not made with regard to Safeway.⁶ The *Mendelsohn* case applied to the Meat Inspection Act the well-settled judicial principle that it is unnecessary in a criminal indictment to negative statutory exemptions and exceptions. Safeway's contention that this was necessary is totally without merit.

II.

It Is Unnecessary to Allege in the Indictment That Defendant Is or Is Not a Retail Dealer in Meat and Meat Products Supplying Its Customers.

Safeway contended in the District Court that the indictment did not sufficiently inform it of the nature and cause of the accusation in that it did not appear thereon whether Safeway Stores, Inc., was being charged as a retail dealer in meat and meat products supplying its customers, with the offense created by statute, or otherwise.

The lack of merit in such contention is immediately apparent upon examination of the statute involved. Section 78 of Title 21 states that. "No *person, firm or corporation shall transport or offer for transportation . . .*" (emphasis supplied) *meat or meat food products which have not been inspected and marked as required by the Meat Inspection Act and the regulations of the Secretary of Agriculture.* In this respect the indictment is in the very language of the statute. Such form of pleading has long been approved by the courts. See *Reynolds v. United States*, 225 F. 2d 123, 126 (C. A. Fla., 1956), cert. den. 350 U. S. 914, reh. den. 350 U. S. 929; *Heas-*

⁶At the time of the offense in the *Medelsohn* case Section 91 of Title 21 had not been amended. The difference in language between the original exemption provisions and those now in effect would in our view have no bearing on the decision of the court.

ley v. United States, 218 F. 2d 86, 88 (C. A. N. D., 1955), cert. den. 350 U. S. 882; *Brown v. United States*, 222 F. 2d 293, 296 (C. A. Cal., 1955); *Cohen v. United States*, 178 F. 2d 588, 591 (C. A. Ohio, 1949), cert. den. 339 U. S. 920.

Rule 7 of the Federal Rules of Criminal Procedure, paragraph (c) provides that, "The indictment or the information shall be a plain, concise and definite written statement of the essential facts constituting the offense charged." It is submitted that the language of each count in the indictment in this case conforms to this rule. It informs Safeway of the charges against it so that it can adequately prepare its defense and is phrased with sufficient particularity so that Safeway is protected against other prosecutions for the same offense. See *Burnett v. United States*, 222 F. 2d 426, 428 (C. A. Ky., 1955); *Anderson v. United States*, 215 F. 2d 84, 86 (C. A. Ky., 1954), cert. den. 348 U. S. 888.

Safeway, before the District Court, cited many cases in support of the rule that it is essential that every ingredient of the crime must be charged in an indictment. The indictment in the instant case complies with this rule in every respect. The offense defined by Section 78 of Title 21 is the *transportation* in interstate commerce by *any* person, firm or corporation of meat or meat food products which have not been inspected and marked as inspected and passed. The indictment charges that on or about certain dates the defendant Safeway Stores, Inc., a corporation, *unlawfully transported* from Los Angeles, California to one of its stores in Las Vegas, Nevada certain quantities of meat and meat food products, which had not been inspected and marked as required by law. There is nothing in Section 78 of the Meat Inspection

Act which indicates that to have violated Section 78 Safeway must have acted in any given capacity in transporting uninspected meat in interstate commerce. It should be remembered that the charge here is not failure to inspect, or failure to affix to the meat or meat food products the stamp "Inspected and Passed." The charge is the transportation of such unmarked meat and under the provisions of Section 78 any *person, firm or corporation* who does such an act is in violation of this section.

Much of Safeway's argument in support of this contention is merely a restatement of the proposition that it is necessary to negative every statutory exception in an indictment charging a violation of statute. Safeway would require that the indictment set forth that it was or was not operating as a retail dealer subject to the exceptions of Section 91. These contentions have heretofore been answered and are clearly not supported by the decisions of this and other courts. The indictment conforms to Rule 7 of the Federal Rules of Criminal Procedure as that rule has been interpreted by the courts.

III.

It Does Not Appear From the Face of the Indictment That Safeway Is Exempt From the Requirements of the Statute.

1. Nothing Contained in the Indictment Brings Safeway Within the Exemption Provisions of Section 91.

It appears that Safeway's position in the District Court on this issue was that the court could judicially notice that Safeway is a large retail chain grocery concern and that as such it automatically fell within the exemption provisions of Section 91. There is nothing in the indictment, other than the name "Safeway Stores, Inc.," that could lead to such a conclusion.

Section 91 of Title 21 establishes exemptions from certain requirements of the Meat Inspection Act with respect to three classes of persons. First, it exempts a "farmer" from compliance with certain provisions of the Act, and defines the term "farmer." Obviously Safeway does not fall within this category of persons exempt from certain provisions of the Act. Second, it exempts a "retail butcher" from compliance with certain provisions of the Act, and defines the term "retail butcher." While it might be argued that Safeway could fall within this exemption as the term is defined in the Act, no such contention was made by Safeway. Rather, Safeway contended that it fell within the third category of persons for which certain exemptions are provided, that of a "retail dealer."

A "retail dealer" is defined in subsection (c) of Section 91 as ". . . any person, partnership, association or corporation *chiefly* engaged in selling meat or meat food products *to consumers only* . . ." (Emphasis supplied.) Of course, there are no facts of record in this proceeding. If the court, however, may judicially notice that Safeway is a large retail chain grocery concern, it may also judicially notice that Safeway's business is not that of ". . . *chiefly* . . . selling meat or meat food products *to consumers only* . . ." (Emphasis supplied.) While it must be admitted that Safeway's meat department is an important branch of its business, it cannot be said that its meat business is its *chief* business anymore than it could be said that its produce business is its chief business, or its bakery business, or its grocery business. This makes it obvious, that *on its face* the indictment does not establish that Safeway is exempt as a "retail dealer" under Section 91. If by any chance Safeway is *chiefly* engaged in selling meat or meat food products to its cus-

tomers, that fact can only be established from evidence offered by way of defense at time of trial. It cannot be established from anything shown on the face of the indictment.

Moreover, there are other reasons why on its face the indictment does not establish Safeway's exemption under Section 91. In the definition of a "retail dealer" provision is made for the transportation of limited quantities of meat and meat food products which have not been inspected and passed and so marked. These quantity limitations are the carcasses of: 5 cattle, 25 calves, 20 sheep, 25 lambs, 10 swine, 20 goats, and 25 goat kids *each week*, or the equivalent in fresh meat therefrom. It is well known that Safeway's operations are extensive and that their volume of meat business is substantial. It is inconceivable that Safeway would transport from its warehouse in Los Angeles to its retail stores in Las Vegas, Nevada, only 5 carcasses of cattle a week. Again it becomes apparent that *on its face* the indictment does not establish that Safeway is exempt from the provisions of the Act. At a trial, evidence may possibly show that despite Safeway's extensive business and its several retail stores in Las Vegas, Nevada, that it did not transport more than 5 carcasses of cattle from Los Angeles, California to Las Vegas, Nevada, during the weeks of January 5 and January 13, 1956. If it otherwise qualified under the exemptions of Section 91, this fact may relieve it of compliance with the Act. *But this fact is not now known* and does not in any way show on the face of the indictment. The logical inference because of the size of the operation is that the exact contrary is true. The exemption is not established by any statement contained in the indictment.

2. The Exemption Provisions of Section 91 Were Never Intended to Apply to the Type of Business Conducted by Safeway.

Manifestly this exemption was never intended to apply to an operation such as is carried on by Safeway. In the debates on the bill which became the Meat Inspection Act, it was stated by members of Congress that the exemption would apply only to the small dealer located near a State line. In explanation of the exemption provisions (Sec. 91) Congressman Wadsworth stated:

“That clause [the exemption in section 91] was put in to exempt the farmer and retail butcher . . . the small dealer who might be located near the state line and who, in the course of his business, peddling from a wagon or cart, passes over a state line.” (Vol. 40 Cong. Rec. Part 9, p. 8722.)

The Act has always been interpreted by those charged with its administration in conformity with this explanation.

In 1938 the Act was amended by Public Law 776, 75th Congress, 3rd Session, and Section 91 was made to read as it now does. While the legislative history pertaining to the enactment of these amendments does not throw much light on the interpretation of Section 91, House Report 2310 and Senate Report 2182, which accompanied Public Law 776 seem to confirm the accuracy of the interpretation placed on the exemption provisions. These reports indicate that it was the intent of Congress to restrict the application of the exemption by the language of the amendments.

For the purposes of the Motion to Dismiss filed by Safeway, the facts alleged in the indictment are presumed to be true. *United States v. Universal Bottle*

Service, 85 Fed. Supp. 622, 625 (D. C. Ohio, 1949). Accordingly, the facts before the court at this time are that Safeway transported from its warehouse at Los Angeles, California, to one of its stores at Las Vegas, Nevada, certain specified quantities of meat and meat products that had not been inspected and marked as "Inspected and Passed." These facts show that the operation carried on by Safeway was not in the nature of a retail operation where it was transporting meat in interstate commerce directly to its customers, but it was rather that of a *wholesale* dealer or distributor transporting meat to its various retail outlets, an operation not intended to be covered by the exemption provisions of the Act.

3. **Exemption Covering the Transportation of Uninspected Meat in Interstate Commerce Is Not Automatic. The Granting of Such an Exemption Is Discretionary With the Secretary of Agriculture and Must Be Requested by the Retail Dealer.**

In reading subsection (c) of Section 91 it might first appear that there are two separate provisions granting the same exemption to retail dealers. In the first paragraph of (c) a "retail dealer" is defined. It then states, ". . . except that the Secretary of Agriculture, *at his discretion may permit* any retail dealer *to transport* in interstate trade or foreign commerce to consumers and meat retailers in any one week not more than five carcasses of cattle . . ." (Emphasis supplied.) This exemption relates to the *transportation* of uninspected meat and meat products, the violation charged in the indictment in this case.

The second paragraph of subsection (c) states that "The provisions of Sections 71-91 of this title, *requiring*

inspection to be made by the Secretary of Agriculture shall not apply . . . to retail dealers in meat and meat food products, *supplying their customers* . . .” (Emphasis supplied.) This exemption applies only to those sections between 71 and 91 which *require inspection* to be made by the Secretary of Agriculture, and only to those retail dealers who are supplying their customers. Section 78, the violation of which is charged in the indictment, in no way requires the Secretary of Agriculture to make an inspection.⁷ This section merely prohibits the transportation of uninspected meat. The second paragraph of subsection (c) does not, therefore provide any exemption to Safeway in connection with the transportation of uninspected meat in interstate commerce as charged in the indictment. If any exemption provisions does apply (which is strongly denied) it is that provided in the first paragraph of subsection (c) of Section 91 relating to the transportation of uninspected meat.

As has heretofore been indicated, this exemption relating to the transportation of uninspected meat is completely discretionary with the Secretary of Agriculture. Permission must be requested to transport uninspected meat under this exemption, and the Secretary of Agriculture must take some action on this request in view of the specific language of the statute which grants the exemption by stating that the Secretary “at his discretion may permit” the transportation of uninspected meat. As we have previously pointed out there are no facts upon which this Court can make a determination as to whether Safeway has or has not filed with the Secretary an appli-

⁷Sections 71, 72, 73, 74, 76, 77, 80, 83 and 89 require in one manner or another inspection by the Secretary of Agriculture.

cation for an exemption.⁸ This emphasizes the fallacy of Safeway's contention that *on its face* the indictment establishes that it is exempt from the provisions of the Act. If Safeway was entitled to an exemption under the first paragraph of subsection (c) of Section 91 (which is denied by the appellant), there is nothing of record to show whether an application was filed by Safeway, whether the Secretary of Agriculture took action on the application, and if so, whether the application was acted on favorably or unfavorably. It would be rather unusual for this indictment to have been brought if favorable action had been taken by the Secretary on a request from Safeway for permission to transport uninspected meat. Yet, these facts are not of record and can be brought out only as matters of defense at a trial. On its face there is nothing to indicate that a request was filed by Safeway or that the request was or was not granted.

4. The Exemption Provisions of Section 91 Are Not Applicable to the Facts Alleged in the Indictment.

The facts in the indictment are admitted to be true for the purpose of the Motion to Dismiss filed by Safeway. *Las Vegas Merchant Plumbers Association v. United States*, 210 F. 2d 732, 741 (C. A. Nev., 1954), cert. den. 348 U. S. 817, reh. den. 348 U. S. 889; *United States v. Lattimore*, 215 F. 2d 847, 851 (C. A. D. C., 1954); *United States v. J. R. Watkins Co.*, 16 F. D. R. 229, 232 (D. C. Minn., 1954).

⁸The United States Department of Agriculture reports that it has no record of any request having been made by Safeway for the transportation of uninspected meat between Los Angeles and Las Vegas during January 1956, or at any other time.

In Count One of the indictment Safeway is charged with transporting from its warehouse in Los Angeles, California, to one of its stores in Las Vegas, Nevada, among other things, "twelve 16-ounce packages of Kold Kist chili con carne, six 1-pound packages of scrapple, twelve 9-ounce tamales, six 14-ounce packages of enchiladas, six 1¼-pound packages of tamales and six 15-ounce packages of beef tacos," which had not been inspected and marked as inspected and passed.

In Count Two of the indictment Safeway is charged with transporting from its warehouse in Los Angeles, California to one of its stores in Las Vegas, Nevada, "256 pounds of cured beef briskets, twelve 9-ounce tamales, twelve 8-ounce packages of chili, six 14-ounce packages of enchiladas, six 1¼-pound packages of tamales, six 15-ounce packages of beef tacos, twelve 6-ounce packages of Taco Snax, and six 1-pound packages of enchiladas with refried beans," which had not been inspected and marked as inspected and passed.

All of the above articles alleged to have been transported by Safeway from Los Angeles, California to Las Vegas, Nevada, without being inspected are *meat food products* as distinguished from animal carcasses or "fresh meat therefrom." The exemption provisions of Section 91 make a clear differentiation as to exemption to be granted for the transportation of animal carcasses or fresh meat therefrom and for meat food products. While provisions is made for granting permission to transport uninspected carcasses of certain animals in limited quantities "or the equivalent of fresh meat therefrom" "to consumers and meat retailers" the statute restricts the transporting of uninspected *meat food products* "to consumers only." (Emphasis supplied.) Again accepting as true the allegations in the indictment for the

purposes of Safeway's Motion to Dismiss, there is nothing contained in the indictment to show that any of the articles transported by Safeway from Los Angeles, California to Las Vegas, Nevada, were delivered to "consumers." The allegations are that they were delivered to one of Safeway's stores located at 1300 East Charleston Boulevard, Las Vegas, Nevada. By no stretch of language can this be construed to fall within the meaning of the statutory exemption, which states, ". . . and to transport in interstate or foreign commerce *to consumers only* meat and meat food products . . . which have not been inspected, examined, and marked as 'Inspected and Passed' in accordance with the terms of Sections 71-91 of this title, and the Acts supplemental thereto, and with the rules and regulations prescribed by the Secretary of Agriculture." (Emphasis supplied.)

This plain statutory language contains no exception, and it has been held that the courts "are not at liberty to construe language so plain as to need no construction. . . ." *Helvering v. City Banks Co.*, 296 U. S. 85, 89. See also *United States v. Raynor*, 302 U. S. 540, 552; *Osaka Shosen Line v. United States*, 300 U. S. 98, 101; *Hamilton v. Rathbone*, 175 U. S. 414, 421; *Lake County v. Rollins*, 130 U. S. 662, 670.

That delivery to a retail store is not the same as delivery to consumers is clearly shown by the fact that as to carcasses and fresh meat the exemption permits delivery to consumers and *meat retailers*, while as to meat food products it permits delivery to "consumers only." If Congress had intended delivery to a retail store to be the same as delivery to consumers there would have been no need to state the two different exemptions and specify "and meat retailers" in the exemption applying to car-

casses and fresh meat. Different exemptions were intended and provided for by Congress. Any other construction would "violate the cardinal rule that, if possible, effect shall be given to every clause and part of a statute." *Ginsberg & Sons v. Popkin*, 285 U. S. 204, 208. See also *McDonald v. Thompson*, 305 U. S. 263, 266; *Market Co. v. Hoffman*, 101 U. S. 112, 115-116.

The indictment, rather than establishing on its face that Safeway is exempt from the provisions of the Meat Inspection Act, clearly establishes that the exemption does not apply in any way to the facts which have been alleged and which must be assumed as true for the purposes of the motion to dismiss.

The purpose of the Meat Inspection Act, briefly stated, is to protect the consuming public from the dangers of impure and unwholesome meat and *meat food products*. If an interpretation were placed on the exemption provisions of the act that would have the effect of exempting the large chain food stores from compliance with the Act, its very purposes would be defeated. It is a well-established principle that a regulatory statute should be interpreted so that its effectiveness will not be impaired, and an interpretation should be adopted which "will preserve the vitality of the Act and the utility of the language . . ." *Sunshine Coal Co. v. Adkins*, 310 U. S. 381, 392. A statute should be construed, if possible, "in a manner which effectuates rather than frustrates the major purpose of the legislative draftsmen." *Shapiro v. United States*, 335 U. S. 1, 31. See also *National Labor Relations Board v. Greensboro Coca-Cola B. Co.*, 180 F. 2d 840, 845 (C. A. 4); *McDonald v. Thompson*, 305 U. S. 263, 266; *Piedmont & Northern Ry. v. Comm'n*, 286 U. S. 299, 311-312.

Conclusion.

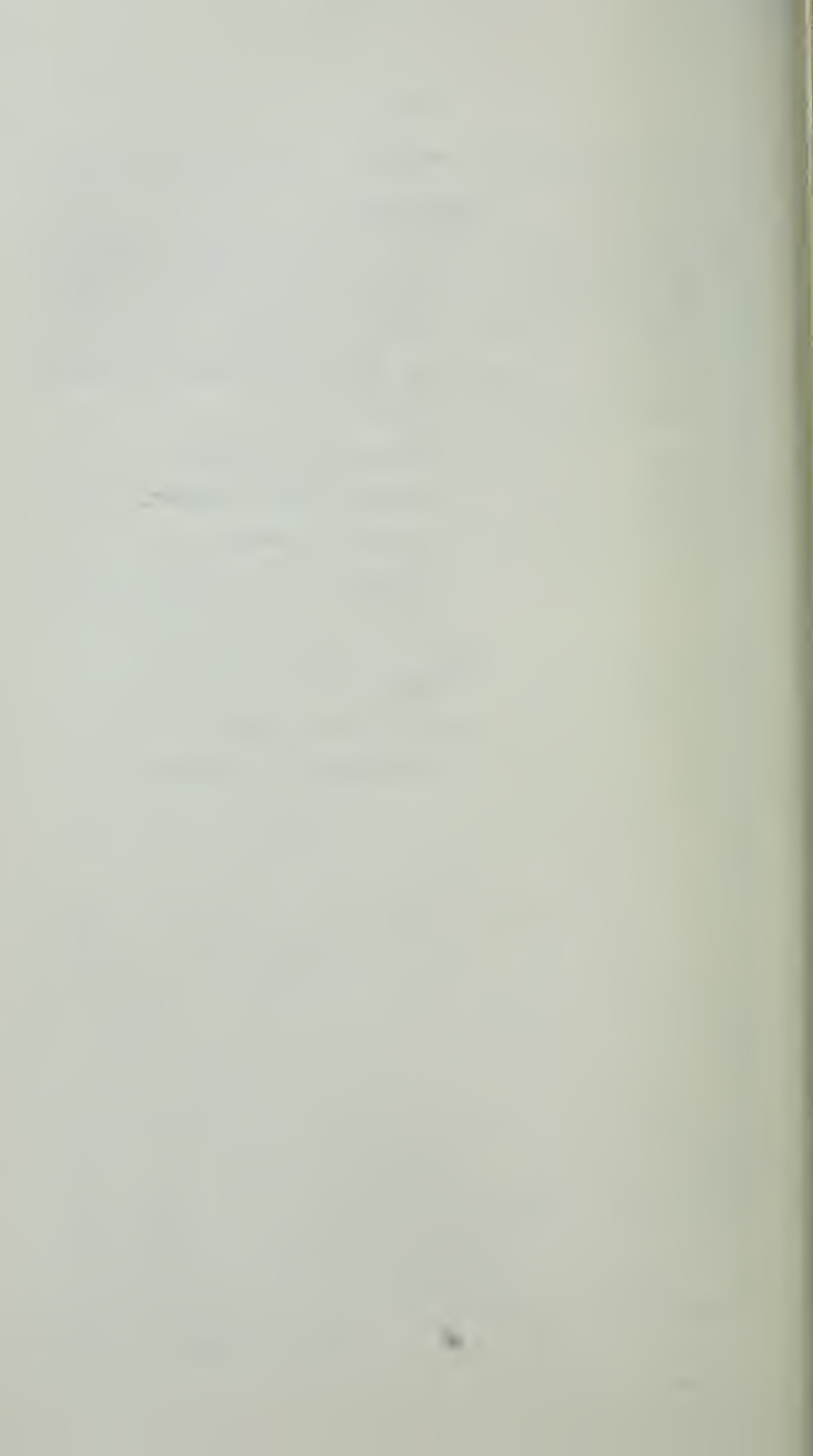
For the foregoing reasons, it is respectfully submitted that the judgment of the District Court granting Appellee's Motion to Dismiss should be reversed, and that defendant Safeway Stores, Inc., should be required to plead to the charges in the indictment.

LAUGHLIN E. WATERS,
United States Attorney,

LOUIS LEE ABBOTT,
Assistant U. S. Attorney,
Chief, Criminal Division,

JOHN K. DUNCAN,
Assistant U. S. Attorney,

PETER JAY HUGHES,
Assistant U. S. Attorney,
Attorneys for Appellant.



No. 15471

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant,

vs.

SAFEWAY STORES, INC., a corporation,

Appellee.

APPELLEE'S BRIEF.

GIBSON, DUNN & CRUTCHER,
JULIAN O. VON KALINOWSKI,
JOHN L. ENDICOTT,

634 South Spring Street,
Los Angeles 14, California,

Attorneys for Appellee.

FILED

AUG 16 1957

PAUL P. O'BRIEN, CLERK



TOPICAL INDEX

	PAGE
Preliminary statement	1
Summary of argument.....	3

I.

Each count of the indictment alleges facts which show that respondent comes within the exception provided in the statute upon which the alleged offense is based, exempting retail dealers in meat and meat products supplying their customers....	4
--	---

II.

The indictment does not sufficiently inform respondent of the nature and cause of the accusation in that: (a) it fails to show that respondent does not come within the statutory exception exempting retail dealers in meat and meat products supplying their customers, and (b) it fails to show whether respondent is being charged as a retail dealer in meat and meat products supplying its customers or otherwise.....	16
A. The indictment fails specifically to allege that respondent does not come within the statutory exception exempting retail dealers in meat and meat products supplying their customers	16
B. The indictment fails to show whether Safeway is being charged as a retail dealer in meat and meat products supplying its customers, or otherwise.....	22

III.

The statute upon which the indictment is based is unconstitutional in that it is so vague and uncertain that it fails to give fair warning or establish an ascertainable standard of guilt and therefore violates the Fifth and Sixth Amendments to the Constitution of the United States.....	23
Conclusion	30

TABLE OF AUTHORITIES CITED

CASES	PAGE
Belle v. United States, 349 U. S. 81, 99 L. Ed. 905.....	8
Berger v. United States, 295 U. S. 78, 79 L. Ed. 1314.....	21
Cline v. Frink Dairy Co., 274 U. S. 445, 71 L. Ed. 1146.....	28, 29
Connally v. General Construction Co., 269 U. S. 385, 70 L. Ed. 322	24
Currin v. Wallace, 306 U. S. 1, 83 L. Ed. 441.....	11
Edwards v. United States, 312 U. S. 473, 85 L. Ed. 957.....	21
Evans v. United States, 153 U. S. 584, 38 L. Ed. 830.....	21, 22
Fleischmann Construction Co. v. United States, 270 U. S. 349, 70 L. Ed. 624.....	10
Hale v. United States, 89 F. 2d 578.....	18
Higa v. Transocean Airlines, 230 F. 2d 780.....	7, 8, 13
Market Co. v. Hoffman, 101 U. S. 112, 25 L. Ed. 782.....	7
McKelvey v. United States, 260 U. S. 353.....	19, 20, 21
Northern Pacific Railroad Co. v. Lewis, 162 U. S. 366, 40 L. Ed. 1002	21
Roland Electric Co. v. Walling, 326 U. S. 657, 90 L. Ed. 383....	8
Schooler v. United States, 231 F. 2d 560.....	8
Sears, Roebuck & Co. v. Blade, 123 Fed. Supp. 131.....	5
State v. J. B. Powles & Co., 155 Pac. 774.....	25, 27
State v. Levitan, 210 N. W. 111.....	27
Steward Machine Co. v. Davis, 301 U. S. 548, 81 L. Ed. 1279....	11
Stokes v. United States, 157 U. S. 187, 39 L. Ed. 667.....	21, 22
Sutton v. United States, 157 F. 2d 661.....	18, 22
Taylor v. United States, 142 F. 2d 808.....	21
United States v. Cardiff, 344 U. S. 174, 97 L. Ed. 200.....	23, 24
United States v. Cook, 84 U. S. 168, 21 L. Ed. 538.....	17, 18, 19
United States v. English, 139 F. 2d 885.....	18
United States v. Katz, 271 U. S. 354, 70 L. Ed. 986.....	10

	PAGE
United States v. Lembo, 184 F. 2d 411.....	21
United States v. Menasche, 348 U. S. 528, 99 L. Ed. 615.....	7, 13
United States v. Mendelsohn, 32 Fed. Supp. 622.....	20
United States v. Ury, 106 F. 2d 28.....	2
United States v. Wood, 159 Fed. 187.....	19
Winters v. New York, 333 U. S. 507, 92 L. Ed. 840.....	24
Zehring v. Brown Materials, 48 Fed. Supp. 740.....	8

MISCELLANEOUS

House Report No. 2310.....	11
Federal Rules of Criminal Procedure, Rule 12(b)(1).....	6
Senate Report No. 2182.....	11
Webster's New International Dictionary (2d Ed.), Unabridged..	25

STATUTES

Food, Drug and Cosmetic Act, Sec. 301(f).....	23
Food, Drug and Cosmetic Act, Sec. 704.....	23
Meat Inspection Act, Sec. 78.....	1
United States Code, Title 15, Sec. 77(e).....	21
United States Code, Title 21, Secs. 71-91	1, 4
United States Code, Title 21, Secs. 71-94.....	4, 17, 20
United States Code, Title 21, Sec. 78	4, 13, 16, 17, 20, 21
United States Code, Title 21, Sec. 91.....	
.....	4, 5, 11, 13, 17, 20, 21, 24, 30
United States Code, Title 21, Sec. 91(c).....	5, 6, 9, 12, 14, 24, 29
United States Constitution, Fifth Amendment.....	3, 23, 30
United States Constitution, Sixth Amendment.....	3, 23, 30
United States Constitution, Fourteenth Amendment.....	28



No. 15471
IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant,

vs.

SAFEWAY STORES, INC., a corporation,

Appellee.

APPELLEE'S BRIEF.

Preliminary Statement.

The Jurisdictional Statement and Statement of the Case contained in Appellant's Opening Brief (hereinafter cited as "App. Op. Br.") are substantially correct. As indicated in Appellant's Opening Brief, the indictment here involved is in two counts. Each count is based upon alleged violations by Respondent, Safeway Stores, Inc. (referred to herein as Safeway) of Section 78 of the Meat Inspection Act (21 U. S. C. §§71-91) in the transportation of certain non-federally inspected processed meat products between Safeway's Los Angeles, California, warehouse and its Las Vegas, Nevada, retail store.

Safeway moved to dismiss the indictment on two basic substantive legal grounds, each of which relates to each count of the indictment [R. pp. 5-7]:

(1) The indictment affirmatively shows on its face that defendant comes within the exception to the

statute upon which the alleged offense is based and therefore has not committed an offense against the United States;

(2) The indictment is insufficient in that it does not inform of the nature and cause of the accusation for the reasons (a) that there is no specific allegation negating the statutory exemption exempting retail dealers in meat and meat products supplying their customers, and (b) that it does not appear whether defendant is being charged as such retail meat products dealer with the offense created by the statute, or otherwise. [R. pp. 5-7.]

The District Court granted Safeway's motion by minute order dated October 16, 1956, and dismissed the indictment. Subsequently, on October 24, 1956, formal order was entered [R. p. 36].¹

The correctness of the District Court's ruling is the one question presented by this appeal. As an additional point, Safeway challenges the constitutionality of the statute upon which the indictment is based.²

The separate points in support of the Court's ruling are set forth in our summary. We shall present these points in the order named without regard to their arrangement

¹Neither the minute order nor the Court's formal order indicate the basis of the Court's decision to dismiss the indictment.

²This point, while not specifically raised below, may be considered by this Court on appeal. *United States v. Ury* (2d Cir. 1939), 106 F. 2d 28.

in Appellant's Brief. Each of these several points in itself requires an affirmance of the order of dismissal.

All emphasis throughout the argument will be ours unless otherwise noted.

Summary of Argument.

There are three independent reasons why the Judgment of Dismissal should be affirmed.

I. The indictment does not sufficiently inform respondent of the nature and cause of the accusation in that:

(a) It fails specifically to allege that respondent does not come within the statutory exception exempting retail dealers in meat and meat products supplying their customers, and

(b) It fails to show whether respondent is being charged as a retail dealer in meat and meat products supplying its customers, or otherwise.

II. Each count of the indictment alleges facts which show that respondent comes within the exceptions provided in the statute upon which the alleged offense is based.

III. The statute upon which the indictment is based is unconstitutional in that it is so vague and uncertain that it fails to give fair warning or establish an ascertainable standard of guilt and therefore violates the Fifth and Sixth Amendments to the Constitution of the United States.

I.

Each Count of the Indictment Alleges Facts Which Show That Respondent Comes Within the Exception Provided in the Statute Upon Which the Alleged Offense Is Based, Exempting Retail Dealers in Meat and Meat Products Supplying Their Customers.

Basically, the indictment charges in each count thereof that Safeway *transported* from its own warehouse in Los Angeles to its own retail store in Las Vegas certain meat food products which had not been inspected, examined and marked “‘Inspected and Passed’ as required by law.” Accordingly, in order to determine whether a statutory offense has been committed, reference must be made to the requirements of the law relating to inspection of meat food products and transportation of these products in interstate commerce.

It will appear that, by the very terms of the statute involved, a retail dealer in meat and meat food products such as Safeway, transporting those products in interstate commerce for sale to its customers, is not required to obtain federal inspection thereof.

Section 78 of Title 21 of the United States Code makes it unlawful to transport in interstate commerce meat or meat food products which have not been inspected, examined, and marked “Inspected and Passed” in accordance with Sections 71 to 94 of Title 21. Section 91 of Title 21 specifically excepts from the provisions of Sections 71-91 requiring inspection, “retail dealers in meat and meat food products, supplying their customers.” The applicable portion of Section 91, as amended, reads as follows:

“The provisions of sections 71-91 of this title, requiring inspection to be made by the Secretary of

Agriculture shall not apply to animals slaughtered by any farmer on the farm and sold and transported in interstate or foreign commerce, *nor to retail butchers and retail dealers in meat and meat food products, supplying their customers.*"

21 U. S. C. 91.

A retail dealer in meat products is defined by Section 91(c) to be one who sells meat products principally to consumers. The pertinent language of the paragraph is as follows:

"A 'retail dealer' means any person, partnership, association, or corporation chiefly engaged in selling meat or meat food products to consumers only * * *."

21 U. S. C. 91(c).

Analyzing the allegations of the indictment, it is apparent that Safeway has not violated the statute: Safeway Stores, Inc., a well-known national retail grocery chain outlet³, was transporting meat food products from its warehouse to its retail store. Accordingly, it was acting as a retail dealer in meat and meat food products supplying its customers. This being true, Safeway is exempt from the inspection requirements of the Meat Inspection Act, and the meat products transported by it to its retail store are not, under the Act, required to be *federally inspected*.

³The Government, in its brief (App. Op. Br. p. 15), appears to challenge for the first time on appeal that the Court may not take judicial notice of the fact that Safeway is not a large retail grocery chain. That a court may judicially notice facts of common knowledge is a rule of long standing. (*Sears, Roebuck & Co. v. Blade* (S. D. Cal. 1954), 123 F. Supp. 131, where the Court held that it could take judicial notice of the fact that Sears was a large retail chain.)

Since it appears on the face of the indictment that the meat food products here in issue were not "required by law" to be inspected, the indictment does not charge the defendant with a crime under the statute. Therefore, the action of the District Court in dismissing the indictment should be affirmed. (Rule 12 (b) (1) Fed. R. Crim. Proc.)

Appellant apparently concedes that a retail dealer is exempt under the Act, but argues that Safeway does not meet the statutory definition of "retail dealer."

In this connection appellant contends, as we read its brief, that (1) the statute should be interpreted to exempt only retail dealers whose business is *chiefly* selling meat products to consumers, (2) Safeway's operation is not in the nature of a retail operation as contemplated by the statute, (3) the exemption is not automatic—it can be granted only by the Secretary of Agriculture upon application by the retail dealer, and (4) the statute restricts the transporting of uninspected meat products to consumers only.

The effect of the Government's first basic contention, that the proviso in question applies only to retail dealers chiefly engaged in the business of selling meat to consumers, is to restrict the application of the statute to retail butchers. This contention is made notwithstanding the language of the statute exempting "retail butchers and retail dealers in meat and meat food products." Such a construction not only ignores the conjunctive "and" but makes the exemption which specifically mentions retail dealers (Sec. 91(c)) superfluous and would emasculate that entire section. The Government's interpretation violates the cardinal principle of statutory construction, that significance and effect shall, if possible, be accorded to every word in the statute. As the Supreme Court aptly

said in *United States v. Menasche* (1955), 348 U. S. 528, 538-539, 99 L. Ed. 615, 624:

"The Government's contention that §405(a) does not apply to any phase in the processing of naturalization petitions would defeat and destroy the plain meaning of that section. 'The cardinal principle of statutory construction is to save and not to destroy.' *N.L.R.B. v. Jones & L. Steel Corp.*, 301 U. S. 1, 30, 81 L. Ed. 893, 907, 57 S. Ct. 615, 108 A. L. R. 1352. It is our duty 'to give effect, if possible, to every clause and word of a statute.' *Montclair v. Ramsdell*, 107 U. S. 147, 152, 27 L. Ed. 431, 433, 2 S. Ct. 391; rather than to emasculate an entire section, as the Government's interpretation requires."

United States v. Menasche, 348 U. S. 528, 538-539, 99 L. Ed. 615, 624.

Similarly, this Court, in *Higa v. Transocean Airlines* (9th Cir. 1955), 230 F. 2d 780, 784, in quoting from *Market Co. v. Hoffman* (1879), 101 U. S. 112, 25 L. Ed. 782, stated:

"Construing the Act's words, if Higa's diversity proceeding at common law were permitted by the High Seas Act it would make superfluous its word 'in admiralty.' As was stated in *Market Co. v. Hoffman*, 101 U. S. 112, at pages 115, 116, 25 L. Ed. 782:

"'We are not at liberty to construe any statute so as to deny effect to any part of its language. It is a cardinal rule of statutory construction that significance and effect shall, if possible, be accorded to every word. As early as in *Bacon's Abridgment*, §2, it was said that 'a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.'" This rule has been repeated innumerable

times. Another rule equally recognized is that every part of a statute must be construed in connection with the whole, so as to make all the parts harmonize, if possible, and give meaning to each.' ”

Higa v. Transocean Airlines, 230 F. 2d 780, 784.

Moreover, the courts have uniformly construed a penal statute, such as here involved, in favor of the party accused under its provisions and resolved any ambiguities in his favor. This principle alone would suffice to support the District Court's dismissal.

Schooler v. United States (8th Cir., 1956), 231 F. 2d 560;

Belle v. United States (1955), 349 U. S. 81, 99 L. Ed. 905.

The only possible interpretation which would comply with the aforementioned rules of statutory construction is that it exempts retail dealers selling meat *chiefly* to consumers, but does not exempt a wholesale dealer, *i. e.*, one selling meat to other dealers who in turn sell such meat to consumers. That Safeway is such a retail dealer seems apparent. Even the Government concedes that Safeway's meat department is “an important branch of its business” (App. Op. Br. p. 16) and that its volume of business is substantial (App. Op. Br. p. 17). The mere fact that Safeway maintains a central warehouse where it temporarily stores its products prior to distribution to its retail stores does not make it any the less a retailer. A retailer is one who sells to consumers whereas a wholesaler sells to retailers who then sell to consumers.

Roland Electric Co. v. Walling (1946), 326 U. S. 657, 90 L. Ed. 383;

Zehring v. Brown Materials (S. D. Cal. 1943), 48 F. Supp. 740, 743.

As an additional argument to their first basic contention, the Government asserts that there is a quantity limitation on retail dealers (App. Op. Br. p. 17) within the exemption which negates Safeway's contention that the indictment shows on its face that Safeway is exempt. This is likewise without merit.

Section 91(c) initially defines a retail dealer as one who sells meat to consumers. After making such definition there is a proviso which permits the Secretary of Agriculture to *expand* this definition by permitting a retail dealer to ship a limited quantity of meat carcasses to consumers and meat retailers. The significant language of this proviso following the definition of "retail dealer" is:

"* * * *except that* the Secretary of Agriculture, at his discretion, *may permit* any retailer to transport in interstate trade * * * to consumers and meat retailers in any one week not more than * * *."

21 U. S. C. 91(c).

It is apparent that the only function of this proviso is to permit the Secretary of Agriculture to extend the exemption granted retail dealers to retail dealers who, in addition to their retail functions, are also performing the functions of a wholesale dealer, *i. e.*, shipping a limited number of carcasses to meat retailers. Safeway is a pure retail dealer and does not engage in the interstate commerce of meat as a wholesale dealer. Therefore, the number of carcasses which Safeway might transport in interstate commerce weekly is entirely immaterial and irrelevant as it has no bearing on whether or not Safeway is a retail dealer.

The Government's second basic contention, that the exemption was never intended to apply to the type of busi-

ness conducted by Safeway, is insupportable. Even the legislative history relied upon by the appellant and set forth in its brief (App. Op. Br. pp. 18-19) does not support its conclusion and there is no indication that any limitation was intended upon the size of a retail dealer.

It must be remembered that at the time the statute was enacted in 1907, and even at the time of the 1938 amendment, retail chain stores such as Safeway's type of operation were unknown. Retail businesses were conducted by small dealers, such as butcher shops or corner grocery stores, whose business was chiefly one or two major commodities such as meats and the like. However, recent times have seen the development of retail chains with commensurate expansion in the volume and number of items carried, improvement in sanitation conditions, merchandising and the like. To say that the retail chain is not exempt from the provisions of the statute, but that the small butcher shop or retailer is, makes little sense. Particularly is this true when the obvious intent of the statute is considered, which is to exempt retail dealers who sell meat to consumers.

It is a fundamental rule of statutory construction that a statute must be given a reasonable or rational interpretation. Contrariwise, a statute should not be so limited in its application as to lead to unreasonable and absurd consequences.

Fleischmann Construction Co. v. United States (1926), 270 U. S. 349, 70 L. Ed. 624;

United States v. Katz (1926), 271 U. S. 354, 70 L. Ed. 986, 987.

It is apparent that, if the statute were interpreted in the sense which the Government contends, it would lead

to the unreasonable and absurd consequences of exempting a small meat retailer but not a chain store who sells meat along with other items.

Moreover, if the Government's contention is sound, retail chain dealers in meat products, including Safeway, would be discriminated against and the statute would violate the due process clause because it would be arbitrary and injurious.

Currin v. Wallace (1939), 306 U. S. 1, 83 L. Ed. 441;

Steward Machine Co. v. Davis (1937), 301 U. S. 548, 81 L. Ed. 1279.

Further, appellant's allegation that Safeway's operation was in the nature of a wholesale operation rather than a retail operation is based upon a misconception of the function of a wholesale dealer. As previously indicated, Safeway clearly operates a retail business, although it does make use of a warehousing system.

Actually, as the legislative history of the Act reveals, it was never intended to encompass the retail sale of meat, but was directed at the activities of *livestock buyers* who had been buying very young calves, butchering and hauling them to large consuming centers where they were sold to commission farms. Thus, as pointed out in the House and Senate Report (H. R. 2310 and S. R. 2182) which accompanied the 1938 amendment to Section 91:⁴

"The purpose of this legislation is to provide more effective inspection and control of the meats which are being sold in the markets. Hundreds of thousands

⁴Section 91 was amended in 1938 by a rewriting of the entire section, including the addition of the definitions outlined in Subparagraphs (a) through (c).

of calves, most of them unfit for human consumption, the majority only a few days old, are bought up by unscrupulous livestock buyers for a price ranging from \$1 to \$5 each, and these are butchered and hauled to the markets of the large consuming centers and sold to commission farms. In turn, they are sold to retail butchers, and thus they find their way to the consumers, who usually buy the meat for a price that seems attractive * * *.

“The bill does not change the farmer’s status, but it will *prohibit livestock buyers from continuing this practice* and will be of material benefit to the consuming public.”

The Government further argues that the exemption granted by the paragraph of Section 91 following Subsection (c) is a part of Subsection (c) and applies only to the Secretary of Agriculture and not to retail dealers in meat (App. Op. Br. pp. 19, 20), that since Paragraph 78 merely prohibits the transportation of meat, it does not require the Secretary to make inspection and Safeway cannot be within the exemption. It is apparent from a mere examination of the language of the statute that the Government’s contention is fallacious. The exemption section (the final paragraph of Sec. 91), is not a part of Subsection (c) but is a complete paragraph standing by itself and exempts not the Secretary of Agriculture but retail dealers in meat food products supplying their customers from the provisions of the Meat Inspection Act. Subsection (c) merely defines the term “retail dealer.” The effect of the Government’s contention is to completely read out of the statute the words “shall not apply

* * * to retail dealers in meat and meat food products, supplying their customers” in the final paragraph of Section 91. Of course, such a result cannot be obtained without legislative mandate.

United States v. Menasche (1955), 348 U. S. 528, 538-539, 99 L. Ed. 615, 624;

Higa v. Transocean Airlines (9th Cir., 1955), 230 F. 2d 780, 784.

Since the exemption of Paragraph 91, if it is to be given any effect whatsoever, must be applicable to retail dealers in meat and meat products supplying their customers, it would likewise exempt retail dealers transporting such meat to their customers. The very language of Section 78 clearly contemplates that the exemption of Section 91 applies, since the transportation of uninspected meat is illegal only if the meat is required to be inspected. Section 78 says in this regard:

“No person, * * * shall transport * * * meat food products thereof which have not been *inspected, examined, and marked as ‘Inspected and passed,’ in accordance with the terms* of sections 71 to 94, inclusive, * * *.”

21 U. S. C. 78.

Moreover, the very legislative history relied on by appellant (App. Op. Br. p. 18) indicates that it was intended to exempt a dealer transporting meat in interstate commerce. Accordingly, Congress did intend to exempt retail dealers, *not* the Secretary of Agriculture, and such exemption extended to transportation, the act prohibited by Section 78. Manifestly, the exemption relied upon is

automatic and not subject to the discretion of the Secretary of Agriculture.

Appellant's final argument, that there is a distinction under the exemption provision between animal carcasses and meat food products (App. Op. Br. pp. 21-24), is based upon the same distortion of the statute as previously commented upon. There is no question that the first part of the proviso contained in Subsection (c) of Section 91 permits the Secretary of Agriculture to allow retail dealers to transport a limited quantity of animal carcasses to consumers and meat retailers. This merely permits the Secretary of Agriculture to extend the definition of a retail dealer. However, there is no indication that the last part of the proviso was intended to allow him to limit the definition of "retail dealer."

In concluding, the Government argues that, if the exemption provision of the Act would have the effect of exempting large chain stores from compliance, the purpose of the Act, the protection of the consuming public from the danger of impure and unwholesome meat and meat food products, would be defeated. However, the Government fails to point out how the purpose of the Act would be furthered by exempting a retail butcher, such as the small dealer referred to in the Congressional history, quoted by the Government in its brief (App. Op. Br. p. 18), who may be located near a state line and who in the course of his business peddles meat from a wagon or cart passing over a state line. It seems

obvious that the danger to the consuming public from impure and unwholesome meat is considerably enlarged by this type of operation which the Government concedes is exempted from the application of the Act. On the other hand, it is absurd to argue that the typical large chain store such as Safeway, with its sanitary control and its high consumer acceptance of its meat products, could, by being exempt from compliance with the Act, thereby endanger the consuming public by selling impure and unwholesome meat. We submit, therefore, that the effectiveness of the statute would not be impaired by exempting the chain stores such as Safeway, or other retailers who chiefly sell meat to consumers, from the provisions of the Act.

Safeway transported meat food products in interstate commerce to its retail store for consumers only and was, therefore, a retail dealer as defined by the statute, regardless of any action taken by the Secretary of Agriculture. Accordingly, Safeway was automatically exempt under the Act and, therefore, the action of the District Court in dismissing the indictment should be affirmed.

For the reasons above set forth, we submit that it is self-evident that Safeway comes within the exception provided in the statute upon which the alleged offense is based and, accordingly, for these reasons alone the dismissal of the indictment should be affirmed.

II.

The Indictment Does Not Sufficiently Inform Respondent of the Nature and Cause of the Accusation in That: (a) It Fails to Show That Respondent Does Not Come Within the Statutory Exception Exempting Retail Dealers in Meat and Meat Products Supplying Their Customers, and (b) It Fails to Show Whether Respondent Is Being Charged as a Retail Dealer in Meat and Meat Products Supplying Its Customers or Otherwise.

We have already shown that the indictment is fatally deficient because it affirmatively shows that Safeway is within the provisions of the exemption to the statutory crime. However, even if this were not the case, the indictment must fail because of its failure sufficiently to inform Safeway of the nature and cause of the accusation.

A. The Indictment Fails Specifically to Allege That Respondent Does Not Come Within the Statutory Exception Exempting Retail Dealers in Meat and Meat Products Supplying Their Customers.

It is axiomatic that an indictment which does not sufficiently inform the defendant of the nature and cause of the accusation is fatally deficient and must be dismissed. That the indictment here involved suffers from this fatal deficiency is obvious from an analysis of the statutory crime. Section 78 of Title 21 of the United States Code provides substantially as follows:

“No person, * * * shall transport * * * from one State * * * to any other State * * * any carcasses or parts thereof, meat or meat food products thereof which have not been inspected, examined and marked as ‘Inspected and passed’ *in accord-*

ance with the terms of sections 71 to 94, inclusive, of this title, and with the rules and regulations prescribed by the Secretary of Agriculture.”

21 U. S. C. 78.

It is apparent that the crime defined by the statute is the transportation of meat which has not been inspected in accordance with the terms of Sections 71 to 94 of the Act. Thus the exception contained in Section 91 is a component part of the definition of the offense and must be negated by the indictment.

It is well settled that where a statute defining an offense contains an exception which is so incorporated with language defining the offense that the ingredients of offense cannot be accurately and clearly described if the exception is omitted, an indictment founded on such a statute must allege enough to show that the accused is not within the exception. In the leading case of *United States v. Cook* (1872), 84 U. S. 168, 21 L. Ed. 538, the Court set forth the above rule as follows:

“Where a statute defining an offense contains an exception, in the enacting clause of the statute, which is so incorporated with the language defining the offense that the ingredients of the offense cannot be accurately and clearly described if the exception is omitted, the rules of good pleading require that an indictment founded upon the statute must allege enough to show that the accused is not within the exception; but if the language of the section defining the offense is so entirely separable from the exception that the ingredients constituting the offense may be accurately and clearly defined without any reference to the exception, the pleader may safely omit any such reference, as the matter contained in the exception is matter of defense and must be shown by the

accused. *Steel v. Smith*, 1 Barn. & Ald. 99; Arch. Cr. Pl., 15th Ed. 54.

“Offenses created by statute, as well as offenses at common law, must be accurately and clearly described in an indictment, and if they cannot be, in any case, without an allegation that the accused is not within an exception contained in the statute defining the offense, it is clear that no indictment founded upon the statute can be a good one which does not contain such an allegation, as it is universally true that no indictment is sufficient if it does not accurately and clearly allege all the ingredients of which the offense is composed. *Rex v. Mason*, 2 T. R. 581.”

United States v. Cook, 84 U. S. 168, 173-174,
21 L. Ed. 538, 539.

See also:

Hale v. United States (4th Cir. 1937), 89 F. 2d
578;

Sutton v. United States (5th Cir. 1946), 157 F.
2d 661, 665;

United States v. English (5th Cir. 1944), 139
F. 2d 885.

It is clear that when the Court speaks of an exception in the “enacting clause” of the statute in the *Cook* case, it does not intend to distinguish the section defining the offense from a subsequent section in the same Act. The Court, in *United States v. Cook*, *supra*, said in this regard:

“Cases have also arisen, and others may readily be supposed, where the exception, though in a subsequent clause or section, or even in a subsequent statute, is, nevertheless, clothed in such language, and *is so incorporated as an amendment with the words antecedently employed to define the offense*, that it

would be impossible to frame the actual statutory charge in the form of an indictment with accuracy, and the required certainty, without an allegation showing that the accused was not within the exception contained in the subsequent clause, section or statute. Obviously such an exception must be pleaded, as otherwise the indictment would not present the actual statutory accusation, and would also be defective for the want of clearness and certainty. *State v. Abbey*, 29 Vt. 66; 1 Bish. Cr. Proc. 2d Ed., §639, n. 3."

United States v. Cook, 84 U. S. 168, 174-175,
21 L. Ed. 538, 539-540.

In *United States v. Wood* (D. N. J. 1907), 159 Fed. 187, the defendant was charged with violating a statute making it unlawful to bring into the United States any Chinese person "in contravention of the provisions of this act." In quashing the indictment the Court quoted from *United States v. Cook*, *supra*, and said:

"Here, then, we find an exception in the enacting clause of the statute. The crime is not fully defined by that clause; but we are compelled to look elsewhere to determine what constitutes the crime therein referred to. In such cases good pleading requires that the indictment should allege enough to show that the accused is not within the exception."

United States v. Wood, 159 Fed. 187-188.

Appellant argues that it is a long-established rule that an indictment founded on a general provision defining the elements of an offense need not negative the matter of an exception made by a *proviso* or other distinct clause. Although this may be the general rule, it is obvious that the statute here in issue is not of the type involved in the case of *McKelvey v. United States* (1922), 260 U. S.

353. The statute in issue in the *McKelvey* case provided substantially as follows:

“Sec. 3. That no person * * * shall prevent or obstruct free passage or transit over or through the public lands: Provided, This section shall not be held to affect the right or title of persons, who have gone upon, improved or occupied said lands under the Land Laws of the United States, claiming title thereto, in good faith.”

The portion of the sentence preceding the proviso clearly defined the offense without referring to any exception, *i. e.*, no person shall obstruct free passage over public lands. As this Court pointed out in its decision in the *McKelvey* case, the proviso was not a *component* part of the definition of the offense. (273 Fed. 410, 415.)

Applying this test to the statute in the instant case, it is apparent that a different result is required.

The crime defined by Section 78, unlike the statute in the *McKelvey* case, is not, that no person shall transport meat, nor that no person shall transport meat which has not been inspected, but the crime is the transportation of meat which has not been inspected *in accordance with the terms of Sections 71 to 94 of Title 21*. Therefore, the very definition of the offense contains as a component part thereof a reference to Sections 71 to 94 and, as such, the exception contained in Section 91 becomes a *component part of the definition of the offense*, and must be negated in the indictment.

Appellant cites the case of *United States v. Mendelsohn* (D. N. J. 1940), 32 F. Supp. 622, a case which was called to the attention of the District Court by the respondent in its original Memorandum of Points and Authorities [R. p. 15]. It is uncertain from the opinion

in that case precisely what allegations were contained in the indictment and whether the facts alleged there were identical with the facts alleged in the instant case. Moreover, respondent submits that the decision is erroneous if it be interpreted to hold that Section 78 of Title 21 does not incorporate by specific language, as a component part of the definition of the offense, the exception contained in Section 91 of the Act. Finally, of course, the decision of the New Jersey District Court is not binding on this Court.

None of the other cases cited by appellant (App. Op. Br. p. 11) are actually in point or of any help in deciding the instant case. In the case of *Edwards v. United States* (1941), 312 U. S. 473, 85 L. Ed. 957, there was no discussion of the statute involved and merely a citation of the *McKelvey* case. In addition, the statute apparently involved, Section 77(e) of Title 15 of the United States Code, contains no exception or reference thereto, and any exception thereto is contained in an entirely separate and distinct section. The case of *Northern Pacific Railroad Co. v. Lewis* (1896), 162 U. S. 366, 40 L. Ed. 1002, is a civil suit for damages and would appear to have no bearing whatsoever on the necessity of negating an exception in a criminal indictment. The cases of *Stokes v. United States* (1895), 157 U. S. 187, 39 L. Ed. 667, and *Evans v. United States* (1894), 153 U. S. 584, 38 L. Ed. 830, both appear to deal with criminal cases in which no contention was made by the defendant that the indictment was defective for failure to negate an exception, nor do the statutes involved appear to have contained exceptions or references thereto in the section defining the offense. Both these cases really dealt with the negating of potential defenses rather than exceptions to the statute. Finally, the case of *Taylor v. United States* (9th Cir. 1944), 142

F. 2d 808, does not appear to involve the issue in the instant case as this Court was not there concerned with an exception in the statute, but rather with whether the defendant had a defense to the charge. Like the *Stokes* and *Evans* cases above referred to, this was more a matter of negating a potential defense rather than an exception in the definition of the offense.

B. The Indictment Fails to Show Whether Safeway Is Being Charged as a Retail Dealer in Meat and Meat Products Supplying Its Customers, or Otherwise.

The indictment is likewise uncertain for the additional reason that it does not state whether respondent is being charged as a retail dealer in meat supplying its customers, or as a slaughterer, packer, canner or meat processor. It is an oft-stated rule that the indictment must set forth the facts so distinctly as to advise the accused of the charge and give him a fair opportunity to prepare his defense, so particularly that a conviction or acquittal would bar another prosecution for the same offense, and so clearly that the court may determine whether the facts stated support a conviction.

Sutton v. United States (5 Cir. 1946), 157 F. 2d 661, 663;

United States v. Lembo (3 Cir. 1950), 184 F. 2d 411;

Berger v. United States (1935), 295 U. S. 78, 81-83, 79 L. Ed. 1314.

The indictment violates this basic constitutional principle in its failure to set forth the character of respondent's activities allegedly in violation of the statutory offense. Therefore, the indictment does not contain sufficient facts to enable the respondent to be advised of the charge against it and prepare its defense accordingly.

III.

The Statute Upon Which the Indictment Is Based Is Unconstitutional in That It Is so Vague and Uncertain That It Fails to Give Fair Warning or Establish an Ascertainable Standard of Guilt and Therefore Violates the Fifth and Sixth Amendments to the Constitution of the United States.

It is fundamental that some substantial degree of definiteness is required of a statute, so that a person charged with its knowledge and existence can determine its applicability and meaning. And it is also well settled that a statute which prohibits the doing of an act in terms so vague that persons of ordinary intelligence must necessarily guess at its meaning violates both the constitutional guarantees of Due Process of the Fifth Amendment and the provision of the Sixth Amendment which requires that the accused be informed of the nature and cause of the accusation. The Meat Inspection Act, on its face, violates these constitutional guarantees since it is impossible to tell from the provisions of the Act what persons are included and what acts are prohibited by what persons under the Act.

In the case of *United States v. Cardiff* (1952), 344 U. S. 174, 97 L. Ed. 200, the Supreme Court of the United States affirmed the decision of this Court and held that the Food, Drug and Cosmetic Act was too vague for judicial enforcement. In that case defendant was charged with violating Section 301(f) of the Act which prohibited refusal to permit entry or inspection as authorized by Section 704. Section 704 authorized inspection after first making requests and obtaining permission for such inspection. In holding the Act too vague for enforcement, the Supreme Court said:

“The vice of vagueness in criminal statutes is the treachery they conceal either in determining what

persons are included or what acts are prohibited. Words which are vague and fluid (*cf. United States v. L. Cohen Grocery Co.*, 255 U. S. 81, 65 L. Ed. 516, 41 S. Ct. 298, 14 A. L. R. 1045) may be as much of a trap for the innocent as the ancient laws of Caligula. We cannot sanction taking a man by the heels for refusing to grant the permission which this Act on its face apparently gave him the right to withhold. That would be making an act criminal without fair and effective notice. *Cf. Herndon v. Lowry*, 301 U. S. 242, 81 L. Ed. 1066, 57 S. Ct. 732. Affirmed."

United States v. Cardiff, 344 U. S. 174, 176-177, 97 L. Ed. 200, 202-203.

See also:

Winters v. New York (1948), 333 U. S. 507, 92 L. Ed. 840;

Connally v. General Construction Co. (1926), 269 U. S. 385, 70 L. Ed. 322.

That the foregoing language is equally applicable to the Meat Inspection Act is apparent from the foregoing analysis of the statutory provisions involved.

The final paragraph of Section 91 of Title 21 of the United States Code provides that the earlier provisions of said Act requiring inspection shall not apply to retail dealers in meat and meat food products supplying their customers. It is apparent that this provision was intended to exempt retail dealers, whatever that term may mean, from the inspection requirements, whatever they may be, of the Act.

Subsection (c) of Section 91 purports to define a "retail dealer" as one *chiefly* engaged in selling meat or meat food products to consumers only. Appellant has contended

(App. Op. Br. p. 16) that this requires that the *chief business* of a retailer be that of selling meat. Respondent contends that what was intended was that the dealer be engaged in selling meat *chiefly to consumers*. These basic differences in interpretation, if nothing more, point up the vagueness and uncertainty of the Act in this respect.

Far more serious than the grammatical problem of what the term "chiefly" was intended to modify is the meaning of the word "chiefly" itself. Webster's New International Dictionary, Second Edition, Unabridged, defines "chiefly" as follows:

"1. In the first place; principally, preeminently; above all; especially. 2. For the most part; mostly; mainly. Also of or pertaining to chiefs."

Thus, the word "chiefly" means "mainly" or "principally." That these words are equally vague and uncertain and do not fix an ascertainable and definite standard for the purpose of determining who is a "retail dealer" is evident from the following authorities, each of which held that the word "principal," when used in a criminal statute in an analogous context, was so vague and uncertain as to violate the Due Process clause of the State Constitution involved.

In the case of *State v. J. B. Powles & Co.* (Wash. 1916), 155 Pac. 774, the Court was confronted with a licensing and regulatory statute pertaining to commission merchants. Defendant was charged by a criminal information with conducting a commission merchant business without a license. The statute defined a commission merchant to be one "whose principal business" was the sale of certain products on account of the shipper or consignor. In sustaining a demurrer to the information, the Supreme

Court of Washington made the following statements which are equally applicable to the instant case:

“The definition attempted in the statute is fatally vague. *Is the principal part of a business 51 per cent of mere pecuniary receipts?* One may do a business in which only 49 per cent in gross receipts is of the commission sort, and yet in which that sort is the most profitable. When one has total receipts of \$100,000 per annum, the commission part may be but \$20,000, and yet his 10 other kinds of business might bring in less than \$10,000 each. Thus, in both gross and net profits the commission department might bring in less than half of all the others put together, and yet bring in much more than any one. There, in one sense, the chief business would be of a commission kind. Would it, though, be the principal within this statute, when it is principal only by that kind of comparison? We are unable to say. We cannot hold, as the lower court did, that ‘principal’ means either gross majority in profits or more than half of all the receipts, or that it means more than any other one kind of receipts. Accordingly, upon the mere basis of money, the statutory definition is vague beyond hope.

“But perhaps the Legislature meant by ‘principal’ *that which brings the most customers or the most transactions*, as where, though only 30 per cent in receipts is of the commission sort, the latter has several times as many transactions as all the others put together. Thus, suppose the commission department causes 1,000 transactions, and yet constitutes a minority in money received, while the other departments, bringing in 51 per cent of the total money, are but 100 in number, shall it be said that the commission business is not the principal one there?

“Finally, *during how long a period is the test to be applied?* Is it the seasonal or the annual receipts that shall control, or is it a view of the man’s business during two or three years? Shall a merchant only starting in business and opening a commission department be judged immediately, or shall the state wait a year or two until his status is reasonably established?

“This sufficiently answers also the state’s attempted definition of the word ‘principal.’ We cannot say that this word meant regular rather than casual, for who shall define what is regular or what is casual? Some casual transactions may be of great moment and bring in during a considerable period a large excess of gross receipts.”

State v. J. B. Powles & Co., 155 Pac. 774, 775.

Similarly, in *State v. Levitan* (Wisc. 1926), 210 N. W. 111, a Wisconsin licensing statute pertaining to wholesale produce dealers was declared unconstitutional. The statute defined a wholesale produce dealer as a person engaged in the business of buying produce for resale principally to others than consumers. In concluding that the definition of a wholesale produce dealer was uncertain, and consequently void, the court said:

“The term ‘principally’ is a relative term, and its meaning is oftentimes uncertain and indefinite. A violation of the statute is constituted a misdemeanor and is punishable, as such, by fine or imprisonment. Such statutes should be reasonably definite, so that anyone who is liable to incur the penalty provided thereby may determine whether or not he comes under the act, and whether or not he is liable to incur such a penalty. * * *

State v. Levitan, 210 N. W. 111, 118.

The foregoing cases clearly establish that the word "principal" does not have a sufficiently definite meaning when used in a criminal statute. Obviously, the word "chiefly" suffers from the same fatal defect and leaves the whole statute without a fixed standard of guilt as to the crime which Safeway is alleged to have committed. Particularly is this true in the light of the Government's argument that Safeway is not within the "retail dealer" exemption.

The fact that the vagueness is in an exception to the statute does not save the statute. In the case of *Cline v. Frink Dairy Co.* (1927), 274 U. S. 445, 71 L. Ed. 1146, the Court was concerned with the Colorado Antitrust Law which denounced certain conspiracies and combinations. The section defining the combinations prohibited provided that no agreement or association should be deemed unlawful where its object was to conduct operations at a reasonable profit. In holding the statute void as violative of due process of law under the Fourteenth Amendment, the Supreme Court of the United States said:

"Such an exception in the statute *leaves the whole statute without a fixed standard of guilt in an adjudication affecting the liberty of the one accused.* An attempt to enforce the section will be to penalize and punish all combinations in restraint of trade in commodity when in the judgment of the court and jury they are not necessary to enable those engaged in it to make it reasonably profitable, but not otherwise. Such a basis for judgment of a crime would be more impracticable and complicated than the much simpler question in the *L. Cohen Grocery Co.* case, whether a price charged was unreasonable or excessive. The real issue which the proviso would submit to the jury would be legislative, not judicial. To compel defend-

ants to guess on the peril of an indictment whether one or more of the restrictions of the statute will destroy all profit or reduce it below what would be reasonable, would tax the human ingenuity in much the same way as that which this court refused to allow as a proper standard of criminality in *International Harvester Co. v. Kentucky*, 234 U. S. 216, 232, 233, 58 L. Ed. 1284, 1292, 34 Sup. Ct. Rep. 853.”

Cline v. Frink Dairy Co., 274 U. S. 445, 457-458, 71 L. Ed. 1146, 1152.

The impossibility of determining who is a “retail dealer” within the meaning of the Act is further compounded by the proviso portion of the first sentence of Section 91(c). The initial portion of this sentence provides that a retail dealer is one chiefly engaged in selling meat to consumers. Thus it appears that anyone performing exclusively retail operations, *i. e.*, selling only to consumers and not to retailers, is a retail dealer and it does not matter if he sells in interstate commerce or whether he sells animal carcasses or meat food products. A retail dealer’s power to sell must include the power to transport. This is supported by that portion of the legislative history relied upon by the Government (App. Op. Br. p. 18) which speaks of peddling across the state line. However, a proviso is tacked on to this otherwise clear definition the first part of, which states that the Secretary of Agriculture may permit a retail dealer to transport to consumers and *meat retailers* a limited number of animal carcasses weekly. It is impossible to tell what was intended to be the effect of this proviso, but it apparently empowers the Secretary of Agriculture to expand the definition of a retail dealer by including, at his discretion, a dealer who is also performing the functions of a wholesaler, *i. e.*, selling to meat retailers.

If the proviso means what the Government contends it means, *i. e.*, that there is no exemption in favor of a retail dealer other than one at the discretion of the Secretary of Agriculture, then the final paragraph of Section 91 is entirely meaningless.

If the exemption is meaningless, and the Government contended before the District Court that it was "an illusory exception" [R. p. 22], this is further proof of the vagueness and uncertainty of the statute. Nothing could be more uncertain than to place an apparent exception in a statute and then so define it and attach provisos thereto so that there is really no exception at all and anyone relying thereon is committing a crime. If this was the intent of Congress, and respondent submits that this cannot have been its intent, or if this is the result of the statutory language, then the statute violates the Fifth and Sixth Amendments to the Constitution and cannot be enforced.

Conclusion.

For all of the reasons hereinbefore set forth, respondent respectfully submits that the decision of the District Court in dismissing the indictment should be affirmed.

Respectfully submitted,

GIBSON, DUNN & CRUTCHER,
JULIAN O. VON KALINOWSKI,
JOHN L. ENDICOTT,

Attorneys for Appellee.

No. 15471

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant,

vs.

SAFEWAY STORES, INC., a corporation,

Appellee.

Appeal From the United States District Court for the
Southern District of California, Central Division.

REPLY BRIEF FOR UNITED STATES OF AMERICA.

LAUGHLIN E. WATERS,
United States Attorney,

LLOYD F. DUNN,
*Assistant U. S. Attorney,
Chief, Criminal Division,*

PETER JAY HUGHES,
*Assistant U. S. Attorney,
600 Federal Building,
Los Angeles 12, California,
Attorneys for Appellant.*

FILE

SEP 25 1957

PAID BY U. S. GOVT



TOPICAL INDEX

	PAGE
Assignment of error in reply to appellee's brief.....	1
Argument	2
The statute upon which the indictment is based adequately de- fines those who come within its proscriptions and clearly describes the conduct forbidden; the statute therefore is not violative of the Fifth or Sixth Amendments to the Con- stitution of the United States.....	2
Conclusion	9

TABLE OF AUTHORITIES CITED

CASES	PAGE
Boyce Motor Lines v. United States, 342 U. S. 337.....	3, 4
Currin v. Wallace, 306 U. S. 1.....	7, 8
Evans v. Florida National Bank et al., 38 F. 2d 627.....	4
Jordan v. DeGeorge, 341 U. S. 223.....	2, 4, 5, 6
Martin et al. v. United States, 100 F. 2d 490, cert. den. 306 U. S. 649.....	5
Nash v. United States, 229 U. S. 373.....	4
Omaechevarria v. Idaho, 246 U. S. 343.....	3
Secretary of Agriculture v. Central Roig Co. et al., 338 U. S. 604	8
United States v. Alford, 274 U. S. 264.....	3
United States v. Petrillo, 332 U. S. 1.....	4
Wickard v. Filburn, 317 U. S. 111.....	8

STATUTES

Bankruptcy Act, Sec. 4(b).....	4
Federal Communications Act, Sec. 506(a)(1).....	4
Meat Inspection Act, Secs. 71-77.....	7, 9
Meat Inspection Act, Secs. 71-94.....	6
Meat Inspection Act, Sec. 78	2, 6
Meat Inspection Act, Sec. 91.....	2, 6, 9
Meat Inspection Act, Sec. 91(c).....	6, 9
United States Code, Title 18, Sec. 835.....	4
United States Code, Title 21, Secs. 71-94.....	2, 8
United States Code Annotated, Title 11, Sec. 22(b).....	4
United States Code Annotated, Title 21, Sec. 91.....	6
United States Constitution, Fifth Amendment.....	8

No. 15471

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant,

vs.

SAFEWAY STORES, INC., a corporation,

Appellee.

Appeal From the United States District Court for the
Southern District of California, Central Division.

REPLY BRIEF FOR UNITED STATES OF
AMERICA.

Assignment of Error in Reply to Appellee's Brief.

The action of the trial court in dismissing the indictment cannot be sustained on the ground that the statute under which the charge was brought is unconstitutional.

ARGUMENT.

The Statute Upon Which the Indictment Is Based Adequately Defines Those Who Come Within Its Proscriptions and Clearly Describes the Conduct Forbidden; the Statute Therefore Is Not Violative of the Fifth or Sixth Amendments to the Constitution of the United States.

Succintly stated, the argument advanced by appellee is that when Sections 78 and 91 of the Meat Inspection Act (21 U. S. C., Secs. 71 to 94) are read together they, in effect, provide that the transportation in interstate commerce of meat or meat food products which have not been marked as inspected and passed is forbidden, except by those "chiefly engaged in selling meat or meat food products to consumers only" and that the exception is so vague and indefinite that it is impossible for appellee to tell whether it comes within the exception. This interpretation of the statute is obviously erroneous for the reasons set out hereafter and for those advanced by appellant in its opening brief. It is submitted, however, that even if appellee were correct in its interpretation of the statute, the legislation would not be defective for failing to apprise adequately those who might come within the terms of the act that the proscriptions therein were applicable to them.

The law is clear as to the standard of definiteness required of penal legislation.

"The test is whether the language conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices."

Jordan v. DeGeorge, 341 U. S. 223, 231-232 (1951).

The difficulty has arisen from applying this standard to specific statutory provisions. The inherent problem is that language which is descriptive of human conduct does not always lend itself to exactness. The problem is compounded by the fact that legislative bodies are faced with the problem of prescribing rules of conduct in wide areas—not simply in limited spheres of activity—and these rules, of necessity, must be prospective. This difficulty has been noted by the Supreme Court of the United States:

“But few words possess a precision of mathematical symbols, most statutes must deal with untold and unforeseen variations in factual situations, and the practical necessities of discharging the business of the government inevitably limit the specificity with which legislators can spell out prohibitions. Consequently, no more than a reasonable degree of certainty can be demanded.”

Boyce Motor Lines v. United States, 342 U. S. 337, 340 (1952).

Certainly, the phrase “chiefly engaged in selling meat or meat food products to consumers only” does not fall below the standard of definiteness required of legislation in a field such as the interstate transportation of meat. This is clear from an examination of but a few of the decisions of the Supreme Court of the United States which have upheld statutes which contained language no more definite.

United States v. Alford, 274 U. S. 264 (1927), holding that a provision of the Penal Code of March 4, 1909, which prohibited building a fire “near” any forest, timber, etc., was not too indefinite.

Omaechevarria v. Idaho, 246 U. S. 343 (1918), upholding a statute which prohibited sheep owners from

grazing on any range "usually occupied by any cattle grower."

Boyce Motor Lines v. United States, supra, upholding a regulation under 18 U. S. C. 835 requiring transporters of explosives to "avoid, so far as practicable . . . driving through congested thoroughfares."

Nash v. United States, 229 U. S. 373 (1913), holding that decisions which interpreted the Sherman Act as applying only to acts or combinations which "unduly" restrict competition or trade did not render the legislation void for indefiniteness.

Jordan v. DeGeorge, supra, holding that the phrase "any crime involving moral turpitude" in Section 19a of the Immigration Act of 1917 which required the deportation of an alien twice convicted of such an offense was not so indefinite as to make the section violative of the Constitution.

United States v. Petrillo, 332 U. S. 1 (1947), holding that Section 506(a)(1) of the Communications Act which prohibited coercing a radio broadcasting licensee to employ persons "in excess of the number of employees needed by such licensee to perform actual services" was not so vague and indefinite as not to provide an adequate standard.

It should be noted that a similar phrase to that with which we are here concerned was found capable of application to a given fact situation in *Evans v. Florida National Bank et al.*, 38 F. 2d 627 (5th Cir., 1930), which was concerned with Section 4(b) of the Bankruptcy Act (11 U. S. C. A., Sec. 22(b)) providing that a "person engaged chiefly in farming" was not subject to involuntary bankruptcy. Turning back to the field of penal legislation the Court of Appeals for the Tenth Circuit in

Martin et al. v. United States, 100 F. 2d 490 (10th Cir., 1938), cert. den. 306 U. S. 649, upheld the Motor Carrier Act of 1935 against a complaint that the act was unconstitutional because of vagueness and uncertainty predicated on a provision that the act did not apply to "a person not engaged in such transportation as a regular occupation or business."

It is significant that the Meat Inspection Act which appellee attacks has been in effect more than fifty years and the specific language upon which the attack is focused has been in effect some nineteen years, yet both parties find themselves reasoning by analogy because no reported case has even considered the problem which appellee now attempts to raise.

"But it has been suggested that the phrase 'crime involving moral turpitude' lacks sufficient definite standards to justify the deportation proceeding and that the statute before us is therefore unconstitutional for vagueness . . .

"It is significant that the phrase has been part of the immigration laws for more than sixty years . . . No case has been decided holding the phrase vague, nor are we able to find any trace of judicial expression which hints that the phrase is so meaningless as to be a deprivation of due process."

Jordan v. DeGeorge, supra, pp. 229-230.

Even if we interpret the statute in the manner urged by appellee, the conclusion simply cannot be supported that Safeway Stores, appellee herein, was not adequately apprised that it did not qualify as an entity "chiefly engaged in selling meat or meat food products to consumers only." Perhaps some hypothetical situation might be posited wherein it would be difficult to apply the phrase with

which we are concerned. This, however, should not be the test in the instant case.

“We have several times held that difficulty in determining whether certain marginal offenses are within the meaning of the language under attack as vague does not automatically render a statute unconstitutional for indefiniteness.”

Jordan v. DeGeorge, supra, p. 231.

It is clear, beyond peradventure, that appellee herein could not have been misled by the language under consideration.

The foregoing discussion used as its point of departure the interpretation of Section 91 of Title 21, U. S. C. A. urged by appellant. The definitive answer to the claim that the Meat Inspection Act is unconstitutional is found by examining the language of the statute. Section 78 of the act prohibits *all persons* from transporting in interstate commerce meat or meat food products which have not been marked as inspected and passed in accordance with the terms of Sections 71 to 94 of the act. Section 91 of the act does not, however, provide a blanket exception for persons who fall within the definition of “retail dealer” therein. Subsection (c) of Section 91 merely gives to the Secretary of Agriculture authority to permit, at his discretion, persons who come within the meaning of “retail dealer” to transport in interstate commerce limited quantities of carcasses and fresh meat to consumers and meat retailers and to transport in interstate commerce to consumers only unlimited quantities of meat food products which have not been inspected and marked as inspected and passed in accordance with the terms of Sections 71 to 91 of the act. Succinctly stated, Sections 78 and 91 of the act when read together merely provide that no meat may be transported in interstate commerce

which has not been marked as inspected and passed—however, the Secretary of Agriculture may permit a “retail dealer” to transport such unmarked meat.

The phrase of which appellee complains therefore is not a provision which it must examine and interpret correctly at the peril of possible penal sanctions, but is simply a delegation of authority to the Secretary of Agriculture. Indeed, much broader powers than those with which we are here concerned have been delegated to the Secretary of Agriculture and sustained. *Currin v. Wallace*, 306 U. S. 1, 16 (1939). The rationale for this type of provision is obvious from an examination of the legislative history set out in appellant’s opening brief wherein it is indicated that the purpose of the act was to protect the consuming public. However, an exception was provided in the case of small dealers who were in effect “peddling” across state lines. (App. Op. Br. p. 18.) Providing an exception only in cases where the Secretary has exercised his discretion obviously permits effective control of those falling within the exception as the permission of the Secretary could be revoked at any time. The proviso reflects a balancing of interests by attempting to protect the consuming public from adulterated meat through a tight check on interstate transportation without destroying the small dealer. An examination of the detailed inspection requirements in Sections 71 to 77 of the act points up the dilemma which would arise if the proviso had not been included. Even a small dealer would have to comply with these detailed inspection requirements or else his activities would be limited to those intrastate. Furthermore, the burden on the government of providing inspectors at each place where cattle were slaughtered, rendered, or packaged even though such operation were small, would be monumental.

The appellee suggests that the interpretation presently urged by the government would be unconstitutional. (Appellee's Br. p. 11.) The lack of merit in this allegation is apparent. Differences in treatment are often required in the area of economic regulations.

Secretary of Agriculture v. Central Roig Co. et al.,
338 U. S. 604 (1950);

Wickard v. Filburn, 317 U. S. 111 (1942).

Furthermore, it should be noted that the equal protection doctrine is not applicable to the Commerce Clause and any discrimination would have to qualify as injurious and violative of the Fifth Amendment to the Constitution before it could be made the subject of a complaint. *Currin v. Wallace*, *supra*. In any event, for reasons heretofore stated, it is obvious that the proviso in Section 91 has a firm basis.

One final word should be said about the interpretation of Section 91 for which appellee has pressed. The last paragraph of that section provides as follows:

"The provisions of Sections 71-91 of this Title, requiring inspection to be made by the Secretary of Agriculture shall not apply to animals slaughtered by any farmer on the farm and sold and transported in interstate or foreign commerce, nor to retail butchers and retail dealers in meat and meat food products, supplying their customers."

Appellee, in effect, argues that it is this provision which exempts any "retail dealer" from the act. The argument ignores the fact that two subjects are dealt with in Sections 71 to 94 of Title 21, U. S. C. One subject is the transportation of meat, and the other subject is the inspection thereof. Obviously the provision quoted above applies only to inspection. The reason for excluding all

retail dealers from the inspection requirements of the act is apparent. If the Secretary of Agriculture exercised his discretion as provided for in the first paragraph of (c) of Section 91 and permitted a retail dealer to transport unmarked meat in interstate commerce, such meat would, nevertheless, be transported in interstate commerce and, hence, the requirements for inspection at the establishments preparing the meat or meat food products for interstate commerce set out in Sections 71 to 77 of the act would have to be met. It is patently clear that the purpose of the proviso discussed above would have been completely thwarted if this were true. Therefore, it is logical that all inspection requirements are dispensed with so far as retail dealers are concerned. A close control, however, on transportation in interstate commerce of meat prepared without the rigorous inspection requirements is maintained.

Conclusion.

For the foregoing reasons it is respectfully submitted that the judgment of the District Court granting Appellee's Motion to Dismiss cannot be sustained on the ground that the Meat Inspection Act is unconstitutional.

LAUGHLIN E. WATERS,
United States Attorney,

LLOYD F. DUNN,
Assistant U. S. Attorney,
Chief, Criminal Division,

PETER JAY HUGHES,
Assistant U. S. Attorney,
Attorneys for Appellant.



No. 15475

United States
COURT OF APPEALS
for the Ninth Circuit

E. V. PRENTICE MACHINERY CO. and
PRENTICE MACHINERY WORKS, INC.,
Appellants,

vs.

ASSOCIATED PLYWOOD MILLS, INC.,
Appellee.

APPENDIX TO APPELLANTS' BRIEF

*Appeal from the United States District Court for the
District of Oregon.*

J PIERRE KOLISCH,
501 Pacific Building,
Portland 4, Oregon,

MOE M. TONKON,
817 Public Service Building,
Portland 4, Oregon,
Attorneys for Appellants.

FILED

JUN 21 1957

PAUL P. O'BRIEN, CLERK



No. 15475

United States
COURT OF APPEALS
for the Ninth Circuit

E. V. PRENTICE MACHINERY CO. and
PRENTICE MACHINERY WORKS, INC.,
Appellants,

vs.

ASSOCIATED PLYWOOD MILLS, INC.,
Appellee.

APPENDIX TO APPELLANTS' BRIEF

*Appeal from the United States District Court for the
District of Oregon.*



TABLE OF CONTENTS

	Page
Order of October 28, 1955.....	1
Plaintiffs' Exhibit 59.....	2
Plaintiffs' Exhibit 88.....	3
Plaintiffs' Exhibit 60.....	4
Plaintiffs' Exhibit 52.....	5
Plaintiffs' Exhibit 54.....	6
Plaintiffs' Exhibit 57.....	7
Plaintiffs' Exhibit 58.....	8
Plaintiffs' Exhibits 86 and 87.....	9
Defendant's Exhibits 307 and 310A.....	10



IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

E. V. PRENTICE MACHINERY CO.,)	
	Plaintiff,	) Civil
vs.	)	No. 7091
	)	ORDER
ASSOCIATED PLYWOOD MILLS, INC.,)	
	Defendant.)

By order dated May 27, 1955, certain issues were segregated in accordance with Rule 42 (b) of the Rules of Civil Procedure. The court in an opinion dated August 16, 1955, held that the cause of action asserted in this case is separate and distinct from the cause of action litigated in a prior case between the parties, being Civil No. 6579. The court further held that the present action is not barred by the doctrines of res judicata and merger. In accordance with such opinion, the motion of defendant, Associated Plywood Mills, Inc., for summary judgment is denied.

Plaintiff's application for a ruling that the judgment of May 8, 1953, entered in Civil No. 6579, is res judicata in the present action and that the defendant Associated is collaterally estopped from denying the findings contained in the court's opinion of April 17, 1953, is denied. However, this denial is without prejudice to plaintiff's privilege of reasserting such claims at the trial.

Plaintiff may not read the court opinion or the findings of April 17, 1953, in Civil No. 6579, or any part thereof, to the jury or refer to them in the presence of the jury without prior authorization from the court.

Dated this 28th day of October, 1955.

Gus J. Solomon,
Judge.



No. 15,478

IN THE

United States Court of Appeals
For the Ninth Circuit

FRANK EGAN,

Appellant,

VS.

HARLEY O. TEETS, Warden State Prison
at San Quentin,

Appellee.

APPELLEE'S BRIEF.

EDMUND G. BROWN,

Attorney General of the State of California,

CLARENCE A. LINN,

Assistant Attorney General of the State of California,

ARLO E. SMITH,

Deputy Attorney General of the State of California,

600 State Building, San Francisco 2, California,

Attorneys for Appellee.

FILED

JUL 31 1957

PAUL P. O'BRIEN, CLERK



Subject Index

	Page
Statement of the case	1
Statement of the facts	1
Appellant's contentions	3
Summary of appellee's argument	3
Appellee's argument	4

I.

The District Court properly denied the petition for a writ of habeas corpus on the ground that all allegations supported by specific factual statements had been previously entertained and denied by the District Court, and that the general allegations of the petition, including the allegation that petitioner had been unconstitutionally denied his appeal, were insufficient to state a cause for relief	4
---	---

II.

The petition for writ of habeas corpus was properly denied as to the allegation of the denial of an appeal since petitioner waived the contention by his failure to raise it in the State Court when the opportunity presented itself; failure to present a contention in the State Court results in a failure to exhaust State remedies within the meaning of 28 U.S.C. §2254	6
--	---

Table of Authorities Cited

Cases	Pages
Brown v. Allen, 344 U.S. 443	8
Burrall v. Johnson, 134 F.2d 614, cert. den. 319 U.S. 768 (1942)	9
Collins v. McDonald, 258 U.S. 416	5
Cuddy, petitioner, 131 U.S. 280	5
Davis v. Johnson, 144 F. 2d 862 (9th Cir., 1944)	10
In re Razutis, 35 Cal. 2d 532	8
In re Swain, 34 Cal. 2d 300	8
Johnson v. Zerbst, 304 U.S. 458	9
Kohl v. Lehlback, 160 U.S. 293	5
Langer v. Ragen, 237 F. 2d 827 (7th Cir., 1956)	5
Mooney v. Holohan, 294 U.S. 202	10
Moore v. Dempsey, 261 U.S. 86 (1922)	10
People v. Egan, 135 Cal. App. 479	27
Price v. Johnson, 334 U.S. 266	5, 6
Rogalski v. Jackson, 146 F. 2d 251 (2d Cir., 1944)	9
Sigurdson v. Landon, 215 F. 2d 791	9
State ex rel. Du Faull v. Utecht, 220 Minn. 431, 19 N.W. 2d 706	10
Sunal v. Large, 332 U.S. 174	9

Statutes

28 U.S.C., Section 2254	4, 6, 11
-------------------------------	----------

No. 15,478

IN THE

**United States Court of Appeals
For the Ninth Circuit**

FRANK EGAN,

Appellant,

VS.

HARLEY O. TEETS, Warden State Prison
at San Quentin,

Appellee.

APPELLEE'S BRIEF.

STATEMENT OF THE CASE.

On the 7th day of November, 1956, appellant's petition for a writ of habeas corpus was denied by the District Court. On November 23, 1956, the District Court denied Egan's petition for rehearing and, on December 5, 1956, denied Egan's application for certificate of probable cause. Petitioner thereafter was granted a certificate of probable cause on December 28, 1956.

STATEMENT OF THE FACTS.

Egan was convicted in the Superior Court of the City and County of San Francisco in 1932 for the

crime of murder. The jury found petitioner Egan guilty of first degree murder and recommended leniency and a life sentence was imposed. Thereafter the District Court of Appeal of the State of California, for the First District dismissed Egan's appeal on the ground that a written notice of appeal had not been filed in compliance with the rules on appeal and that no steps had been taken to obtain said record on appeal. See *People v. Egan*, 135 Cal. App. 479. In that proceeding petitioner was represented by counsel.

Petitioner filed a petition for writ of habeas corpus in the United States District Court containing several allegations. Among them was the allegation that petitioner had been denied his right of appeal. The United States District judge denied the petition on the ground that the allegations supported by sufficient facts had been previously presented to the District Court in a prior writ and had been denied by the United States District Court. In dismissing the petition for writ of habeas corpus the District judge stated as follows:

"Several general grounds for relief are asserted in the present petition, the only grounds which are supported by specific factual allegations have previously been presented to this court in a prior petition for the writ, Case No. 26700-R. After a hearing upon that petition, the Honorable Leonard Yankwich filed comprehensive findings of fact and conclusions of law on April 11, 1947, on which date he dismissed the petition and discharged the order to show cause which had previously been issued."

This court granted a certificate of probable cause solely on the question as to whether or not the District Court properly denied the petition insofar as it alleges the unconstitutional denial of his appeal.

APPELLANT'S CONTENTIONS.

The suppression by the Superior Court judge of a legally sufficient written notice of appeal resulted in the unconstitutional denial of petitioner's right to appeal.

SUMMARY OF APPELLEE'S ARGUMENT.

I.

The District Court properly denied the petition for a writ of habeas corpus on the ground that all allegations supported by specific factual statements had been previously entertained and denied by the District Court, and that the general allegations of the petition, including the allegation that petitioner had been unconstitutionally denied his appeal, were insufficient to state a cause for relief.

II.

The petition for writ of habeas corpus was properly denied as to the allegation of the denial of an appeal since petitioner waived the contention by his failure to raise it in the State Court when the opportunity presented itself; failure to present a contention in the

State Court results in a failure to exhaust state remedies within the meaning of 28 U.S.C. §2254.

APPELLEE'S ARGUMENT.

I.

THE DISTRICT COURT PROPERLY DENIED THE PETITION FOR A WRIT OF HABEAS CORPUS ON THE GROUND THAT ALL ALLEGATIONS SUPPORTED BY SPECIFIC FACTUAL STATEMENTS HAD BEEN PREVIOUSLY ENTERTAINED AND DENIED BY THE DISTRICT COURT, AND THAT THE GENERAL ALLEGATIONS OF THE PETITION, INCLUDING THE ALLEGATION THAT PETITIONER HAD BEEN UNCONSTITUTIONALLY DENIED HIS APPEAL, WERE INSUFFICIENT TO STATE A CAUSE FOR RELIEF.

The District Court properly denied the petition insofar as it alleged an unconstitutional denial of an appeal on the ground that said allegation was too general to state a cause for relief.

The only reference in the petition for the denial of an appeal is as follows: "He was denied of his rights to appeal from his conviction. . . ."

This allegation is one unsupported by any particulars. The petitioner has failed to state any facts to support his general allegation that he was denied the right to an appeal.

A petitioner is required to state the facts upon which he relies as a basis for relief on habeas corpus. He may not rely on a conclusion of law. This universal rule does not require of the petitioner any compliance with legal technicalities. All such rule requires

is an honest and frank statement of the facts upon which he relies. The petition filed in the instant case is typical of the problems created by permitting the pleading of conclusions in habeas corpus petitions. Only the bare conclusion is stated and it is intermixed with much psuedo-legal argument which serves only to confuse and compound the issue. The court should insist that petitioners frankly state the facts upon which they rely as a basis for relief in a habeas corpus petition. The court should state that the legal arguments upon which petitioner rely are secondary to an honest statement of the facts.

The proposition that an allegation of law unsupported by any specific fact is insufficient to state a cause for relief is supported by many cases. See, *Collins v. McDonald*, 258 U.S. 416, 420-421; *Kohl v. Lehlback*, 160 U.S. 293, 299; *Cuddy, petitioner*, 131 U.S. 280, 286. Also see, *Langer v. Ragen*, 237 F. 2d 827, 7th Cir. 1956; and cf. *Price v. Johnson*, 334 U.S. 266, 286-287.

It should be noted that the case of *Price v. Johnson*, supra, although frequently referred to as supporting the proposition that a pleading of a conclusion is sufficient in a habaes corpus case does not so hold. Furthermore, the *Price* case is clearly distinguishable from the present case in that in the case of *Price v. Johnson*, supra, the District Court did not pass upon the sufficiency of the allegation. Whereas, in the present case the District Court expressly determined that the allegations not presented on a prior petition were too general to support a writ of habeas corpus.

In this respect the case of *Price v. Johnson*, supra, stated as follows at 286-287:

“The government argues before us that the allegation in question, as presented to the District Court, is a mere allegation of law unsupported by reference to any specific facts. As such, the allegation is said to be fatally deficient and to warrant summary denial. . . .

“But this proposition was apparently not presented to or passed upon by the District Court; nor was it determined by the Court of Appeal. The sole complaint made by the government in the lower courts . . . relates to petitioner’s alleged abuse of the writ of habeas corpus. . . . We accordingly address ourselves to the alleged abuse of the writ leaving the government free to press its objections to the adequacy of the allegation after the proceedings are renewed before the District Court.”

II.

THE PETITION FOR WRIT OF HABEAS CORPUS WAS PROPERLY DENIED AS TO THE ALLEGATION OF THE DENIAL OF AN APPEAL SINCE PETITIONER WAIVED THE CONTENTION BY HIS FAILURE TO RAISE IT IN THE STATE COURT WHEN THE OPPORTUNITY PRESENTED ITSELF; FAILURE TO PRESENT A CONTENTION IN THE STATE COURT RESULTS IN A FAILURE TO EXHAUST STATE REMEDIES WITHIN THE MEANING OF 28 U.S.C. §2254.

Petitioner’s contention that he was denied an appeal has been waived by his failure to present the matter to the District Court of Appeal of the State of California on the proceedings to dismiss the appeal. Petitioner has now alleged in the petition for writ of

habeas corpus that he was denied his right to appeal from his conviction. This allegation is particularized by statements in his brief on appeal. In the brief on appeal he asserts that he prepared a written notice of appeal, gave it directly to the trial judge in his criminal case and that this document was withheld from the appeal record. His effort to perfect an appeal was thus frustrated. He alleges that this memorandum complied with the rules on appeal in existence at that time.

Petitioner's appeal in the State Court was dismissed in 1933 in a proceeding reported as *People v. Egan*, 135 Cal. App. 479. At that time affidavits were filed by both parties. In none of the affidavits filed did petitioner or his counsel contend that a legally sufficient notice of appeal had been personally given to the trial judge and had been suppressed by him. Furthermore, it should be noted that the proceedings in 1947 instituted in both the State and Federal Courts failed to contain this allegation. Likewise, affidavits in support of a proceeding filed in the District Court of Appeal in 1947 entitled a Motion to Set Aside the Dismissal of Appeal did not contain such an allegation. At that time affidavits were filed by both petitioner and petitioner's trial counsel. Examination of the affidavits fails to reveal any reference to the filing of a written notice of appeal with the trial judge.

It is evident that this matter could have been raised in the State Court by affidavit on the motion to dismiss the appeal. Furthermore, such contentions

should have been raised in the State Court and failure to raise the matter constitutes a waiver. Indeed, as said in the case of *Brown v. Allen*, 344 U.S. 443 at 503, rights under the federal constitution may be waived at the trial and by failure to assert such errors on appeal. The opinion in *Brown v. Allen*, *supra*, at 503 states the rule as follows:

“Of course, nothing we have said suggests that the federal habeas corpus jurisdiction can displace a state’s procedural rule requiring that certain errors be raised on appeal. Normally, rights under the federal constitution may be waived at the trial (Citation omitted) and may likewise be waived by failure to assert such error on appeal. (Citation omitted) When a state insists that a defendant be held to his choice of trial strategy and not be allowed to try a different tack on state habeas corpus he may be deemed to have waived his claim and thus has not right to assert on federal habeas corpus. Such considerations of orderly appellate procedure give rise to the conventional statement that habeas corpus should not do service for an appeal.”

The rule of California requires that a party raise all objections and present all defenses at the earliest opportunity. To avoid operation of this rule the party attacking a judgment collaterally must indicate that he had no opportunity at an earlier date to present the matters alleged. *In re Razutis*, 35 Cal. 2d 532, 536; *In re Swain*, 34 Cal. 2d 300, 302.

Under any other rule the defendant at the trial could himself suppress the facts, reserving a case for

his later release after opposing witnesses are no longer available. Or indeed he could wait until the agent of the state who is alleged to have committed the unconstitutional act of suppression, such as suppressing of the notice of appeal or knowingly using perjured testimony is no longer available to deny the allegation. The present case is directly in point. The petitioner has waited 25 years before making the allegation that the trial judge was presented with a written notice of appeal which complied with the rules on appeal and that the trial judge suppressed said notice and excluded it from the record of the proceeding. Needless to say that trial judge is no longer available to deny said allegation.

The rule that a defendant must inquire into matters within his knowledge at the earliest opportunity or waive his right to raise them has been recognized by this court. See *Burrall v. Johnson*, 134 F.2d 614, cert. den. 319 U.S. 768 (1942); *Rogalski v. Jackson*, 146 F. 2d 251 2d Cir. 1944; *Sigurdson v. Landon*, 215 F. 2d 791 at 796. See also *Johnson v. Zerbst*, 304 U.S. 458 at 467. Cf. *Sunal v. Large*, 332 U.S. 174 which holds that a writ of habeas corpus may not be used as a substitute for an appeal. The rule here involved might be accurately stated as follows. All questions must be urged at the trial or raised on appeal or be deemed waived. However, the "constitutional" or "jurisdictional" questions may be raised at any time if (a) the matter appears on the face of the record, or (b) if the matter is of such nature that it could not be raised at the trial as where the defendant did not have

knowledge of the facts upon which he relies or where by the very nature of the denial he was precluded from raising the denial at the trial.

Where the face of the record reflects that the court lacked jurisdiction of such matter the judgment may be attacked at any time.

Matters that are not within the knowledge of the defendant at the time of the trial do not come within the rule of, for example, *Mooney v. Holohan*, 294 U.S. 202 (alleged knowing use of perjured testimony by prosecution). This rule is not to be confused with the fact that the defendant may have been unaware of the legal significance of the facts within his knowledge. Ignorance of the legal significance of the facts does not influence the operation of the waiver of rule. See *State ex rel. Du Faull v. Utecht*, 220 Minn. 431, 19 N.W. 2d 706; *Davis v. Johnson*, 144 F. 2d 862 (9th Cir., 1944).

Also where by the nature of the constitutional objection petitioner is precluded from raising at the trial the matter may be raised by a petition for writ of habeas corpus for example *Moore v. Dempsey*, 261 U.S. 86 at 88 (1922). In this case mob domination at the trial precluded counsel from requesting a delay or change of venue. Likewise in this category fall all of the denial of the assistance of counsel cases; by the very nature of the denial petitioner is deprived of his opportunity to raise the objection.

Because the petitioner Egan did not raise these matters on the proceedings to dismiss his appeal he

has failed to invoke the corrective process of the State of California and the judgment of the District Court denying his petitioner should be affirmed. Petitioner has not exhausted his state remedies, 28 *U.S.C.* §2254.

Dated, San Francisco, California,
July 24, 1957.

Respectfully submitted,

EDMUND G. BROWN,

Attorney General of the State of California,

CLARENCE A. LINN,

Assistant Attorney General of the State of California,

ARLO E. SMITH,

Deputy Attorney General of the State of California,

Attorneys for Appellee.



No. 15485

United States
Court of Appeals
for the Ninth Circuit

UNITED STATES OF AMERICA,

Appellant,

vs.

BARNEY A. GERTZ, Owner of 3,827 Coins Being
Likenesses of the 1847 "Hapa Haneri" Issued
by the Hawaiian Government,

Appellee.

Transcript of Record

Appeal from the United States District Court
for the District of Hawaii.

FILED

APR 22 1957

PAUL P. O'BRIEN, CLERK



No. 15485

**United States
Court of Appeals**
for the Ninth Circuit

UNITED STATES OF AMERICA,

Appellant,

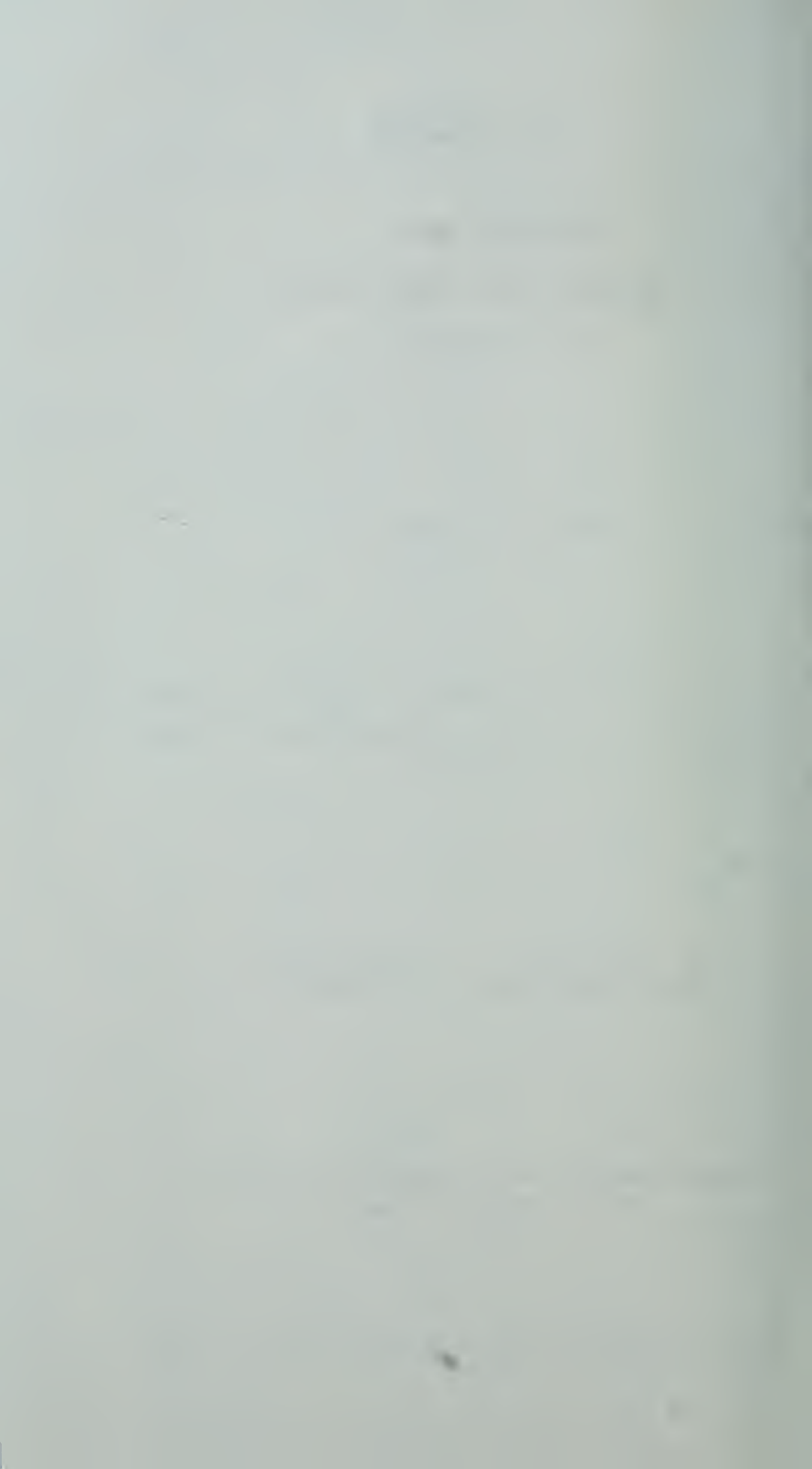
vs.

BARNEY A. GERTZ, Owner of 3,827 Coins Being
Likenesses of the 1847 "Hapa Haneri" Issued
by the Hawaiian Government,

Appellee.

Transcript of Record

**Appeal from the United States District Court
for the District of Hawaii.**



INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

	PAGE
Answer	11
Attorneys, Names and Addresses of	1
Certificate of Clerk	84
Decision	14
Docket Entries	81
Judgment and Order Returning Seized Property to Owner	19
Libel of Information	3
Motion to Dismiss	10
Citation of Authorities	10
Notice of Hearing.....	11
Notice of Appeal	21
Oral Decision	72
Oral Decision on Motion to Reconsider	76
Order Extending Time for Filing Record and Docketing Appeal Filed February 6, 1957 ...	22
Order Extending Time for Filing Record and Docketing Appeal Filed March 6, 1957	22
Oral Ruling on Respondent's Motion to Dismiss	23

INDEX	PAGE
Statement of Points Upon Which Appellant Intends to Rely on Appeal	86
Stipulation for Extension of Time	9
Stipulation of Facts	12
Transcript of Proceedings	25
Witnesses:	
Bauer, H. E.	
—direct	43, 51
—voir dire	48
—cross	57
Chang, Eugene	
—direct	28
Gertz, Bernard	
—direct	63
—cross	67
Hohu, Mrs. Clarence	
—direct	37
—cross	42
Warrant of Seizure and Monition	7
Public Notice of Attachment	6
Return on Service of Writ	5

NAMES AND ADDRESSES OF ATTORNEYS

For the Libelant:

LOUIS B. BLISSARD, ESQ.,
United States Attorney,
District of Hawaii; by
CHARLES R. WICHMAN, ESQ.,
Assistant United States Attorney.

For the Respondent:

LOUIS A. RODRIGUES, and
PATRICK F. TUOHY,
P. O. Box 48,
Honolulu, Hawaii, by
PATRICK F. TUOHY, ESQ.



In the United States District Court
for the District of Hawaii

Civil No. 1474

UNITED STATES OF AMERICA,

Libelant,

vs.

3,827 COINS, Being Likenesses of the 1847 "Hapa
Haneri" Issued by the Hawaiian Government,

Respondent.

LIBEL OF INFORMATION

To: The Honorable, the Presiding Judge of the
United States District Court for the District
of Hawaii:

The Libel of Information of the United States of America, by Louis B. Blissard, United States Attorney for the District of Hawaii, in a civil cause of forfeiture, for breach of the laws of the United States and, in particular, Title 18, United States Code, Sections 489 and 492, alleges upon information and belief as follows:

1. That on or about February 7, 1956, in the City and County of Honolulu, Territory of Hawaii, and within the jurisdiction of this Court, Special Agent in Charge, Fred A. Irwin, United States Secret Service Field Force, seized as forfeited to the United States of America, for violation of Title 18, United States Code, Section 489, approximately

1,827 likenesses of the 1847 "Hapa Haneri" coin issued by the Hawaiian Government, and on February 29, 1946, approximately 2,000 additional such likenesses of the above-referred-to 1847 "Hapa Haneri" coin.

2. The said coins are now in the custody and possession of Fred A. Irwin, Special Agent in Charge of the United States Secret Service Field Force, Honolulu, Hawaii, and is in the City and County of Honolulu, and within the jurisdiction of this Court.

3. That on or about February 7 and 29, 1956, Barney A. Gertz did have in his possession with intent to sell, give away, and otherwise use same, without authority of the Secretary of the Treasury, or other proper officer of the United States, [3] tokens, disks and devices in the likenesses and similar in design and color and the inscription thereon of a coin of a foreign country issued as money under authority of said foreign government, to wit, likenesses of the 1847 "Hapa Haneri" coin issued as money by the Hawaiian Government, in violation of Section 489 of Title 18, United States Code.

4. By reason of the foregoing, the respondent coins became and are forfeited to the United States of America, under Title 18, United States Code, Section 492.

Wherefore, Libelant prays that due process issue in this behalf, as well as attachment to bring the respondent coins within the jurisdiction of this Court to enforce the forfeiture, and to give notice

to all persons concerned in interest, to appear and duly intervene herein by claim and plea to show cause why the forfeiture should not be decreed; and due proceedings being had thereon, Libelant further prays that this Court decree forfeiture to the United States of America of the respondent coins and their disposition pursuant to law.

Dated: Honolulu, T. H., this 28th day of March, 1956.

UNITED STATES
OF AMERICA,
Libelant;

LOUIS B. BLISSARD,
United States Attorney, District of Hawaii, Its At-
torney;

By /s/ CHARLES R. WICHMAN,
Assistant U. S. Attorney.

[Endorsed]: Filed March 28, 1956. [4]

Return on Service of Writ

United States of America,
District of Hawaii—ss.

I hereby certify and return that I executed the annexed Warrant of Seizure and Monition on the therein-named 3,827 Coins, being likenesses of the 1847 "Hapa Haneri" issued by the Hawaiian Government, by attaching the said 3,827 Coins, personally at Room 324 Federal Building, Honolulu, T. H.,

at 1:30 o'clock p.m., on the 28th day of March, 1956, and by handing to and leaving a true and correct copy thereof with Barney A. Gertz personally at 1008 Kawaiahao Street, at Honolulu, T. H., in the said District at 2:50 p.m., on the 28th day of March, 1956.

THOMAS R. CLARK,
United States Marshal;

By /s/ CHARLES A. GERLACH, JR.,
Deputy. [5]

Public Notice of Attachment
Office of the Marshal of the United States
District of Hawaii

March 28th, 1956.

This 3,827 Coins, being likenesses of the 1847 "Hapa Haneri" issued by the Hawaiian Government having been attached by me and now being in my possession by virtue of a Libel of Information and Monition issued out of the District Court of the United States for the District of Hawaii.

Notice Is Hereby Given that any person removing or attempting to remove said 3,827 Coins, likenesses of the 1847 "Hapa Haneri," etc. without my written permission, or in any way interfering with said 3,827 Coins, likenesses of the 1847 "Hapa Haneri,"

etc. or my duly authorized Deputy or Keeper in charge thereof, Will Be Prosecuted to the Extent of the Law.

/s/ THOMAS R. CLARK,
U. S. Marshal. [6]

WARRANT OF SEIZURE AND MONITION

United States District Court for the
District of Hawaii

To: The Marshal of the United States, District of
Hawaii:

Whereas, on the 28th day of March, A.D. 1956, a Libel of Information was filed in the United States District Court for said District of Hawaii, by Louis B. Blissard, United States attorney for said District, on behalf of the United States, against 3,827 Coins, being likenesses of the 1847 "Hapa Haneri" issued by the Hawaiian Government, and praying that all persons including Barney A. Gertz, 1008 Kawaiahao Street, interested in said goods, wares and merchandise may be cited in general and special, to answer the premises; and due proceedings being had, that the said goods, wares and merchandise may, for the causes in said Libel of Information mentioned, be condemned as forfeited to the use of the United States.

You Are Therefore Hereby Commanded to attach the said goods, wares and merchandise, and to de-

In the United States District Court for
the District of Hawaii
Civil No. 1474

UNITED STATES OF AMERICA,

Libelant,

vs.

3,827 COINS, Being Likenesses of the 1847 "Hapa
Haneri" Used by the Hawaiian Government,
Respondent.

STIPULATION FOR EXTENSION OF TIME

It Is Hereby Stipulated and Agreed by and between the parties hereto, through their respective attorneys, that the Respondent above named may have up to and including the 16th day of May, 1956, within which to answer or otherwise plead to the libel information herein.

Dated at Honolulu, T.H., this 16th day of April, 1956.

UNITED STATES ATTORNEY,

By /s/ CHARLES R. WICHMAN,
Deputy U. S. Attorney.

LOUIS A. RODRIGUES, and
PATRICK F. TUOHY,

By /s/ PATRICK F. TUOHY,
Attorneys for Respondent.

Approved:

/s/ J. FRANK McLAUGHLIN,
Judge of the Above-entitled
Court.

[Endorsed]: Filed April 16, 1956. [9]

[Title of District Court and Cause.]

MOTION TO DISMISS

Barney A. Gertz, owner of the respondent coins,
moves the Court as follows:

1. To dismiss the action because the Libel of Information fails to state a claim against respondent coins upon which relief can be granted.

/s/ LOUIS A. RODRIGUES,

/s/ PATRICK F. TUOHY,

Attorneys for Owner of
Respondent Coins. [11]

[Title of District Court and Cause.]

CITATION OF AUTHORITIES

a. House Report (Judiciary Committee Report)
No. 3042 51st Congress, First Session included in
Volume 10, of House Reports.

b. U. S. vs. Roussopoulos—95 F. 977.

c. U. S. vs. Hopkins—26 F. 443.

d. U. S. vs. Gardner—9 L. ed. 556.

e. U. S. vs. Kuhl—85 F. 624.

f. U. S. vs. Barret—111 F. 369.

g. U. S. vs. Fitzgerald—11 F. 369, 91 F. 374.

h. Rule 12(b)—Fed. Rules of Civil [12] Procedure.

[Title of District Court and Cause.]

NOTICE OF HEARING

To: Louis A. Blissard, United States Attorney:

Please take notice that the undersigned will bring the above motion on for hearing before this Court at the United States Courts & Post Office Building, Honolulu, Hawaii, on the 23rd day of May, 1956, at 10:00 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard.

/s/ LOUIS A. RODRIGUES,

/s/ PATRICK F. TUOHY,

Attorneys for Owner of
Respondent Coins.

[Endorsed]: Filed May 15, 1956. [13]

[Title of District Court and Cause.]

ANSWER

To: The Honorable, the Presiding Judge of the United States District Court for the District of Hawaii:

The answer of the claimant, Barney A. Gertz, to the libel herein, alleges:

1. Claimant denies the allegations of paragraph 1 of the libel.
2. Claimant admits the allegations of paragraph 2 of the libel.

3. Claimant denies the allegations of paragraph 3 of the libel.

4. Claimant denies the allegation of paragraph 4 of the libel.

First Defense

5. Further answering and as a separate defense, Claimant alleges as follows: That the coins now in the custody of Fred A. Irwin, are not such as to bring them within Section 489 of Title 18, United States Code.

Wherefore, Claimant prays that the libel herein be dismissed.

/s/ LOUIS A. RODRIGUES,

/s/ PATRICK F. TUOHY,

Attorneys for Claimant.

[Endorsed]: Filed May 31, 1956. [15]

[Title of District Court and Cause.]

STIPULATION OF FACTS

It Is Hereby Stipulated and Agreed by the Libelant and Respondent:

(1) That on February 7, 1956, in the City and County of Honolulu, Territory of Hawaii, and within the jurisdiction of this Court, Fred A. Irwin, Special Agent in Charge, U. S. Secret Service Field Force, seized as forfeited to the United States of America, in violation of Title 18, United States

Code, Section 489, approximately 1,827 tokens, disks and devices, and on February 29, 1956, he further seized approximately 2,000 additional identical tokens, disks and devices.

(2) That said coins are now in the custody and possession of Fred A. Irwin, Special Agent in Charge of the United States Secret Service Field Force, Honolulu, Hawaii, and is in the City and County of Honolulu, and within the jurisdiction of this Court.

(3) That on or about February 7 and 29, 1956, Barney A. Gertz did have in his possession with intent to sell, give away and otherwise use same, tokens, disks and devices, without authority of the Secretary of the Treasury, or other proper officer of the United States.

This leaves in issue the following facts:

(a) That the approximately 3,827 tokens, disks and devices are likenesses of the 1847 "Hapa Haneri" coin issued by the Hawaiian [17] Government.

(b) That the 1847 "Hapa Haneri" coin was issued as money by the Hawaiian Government.

Dated: Honolulu, T. H., this 6th day of August, 1956.

LOUIS B. BLISSARD,
United States Attorney, District of Hawaii, At-
torney for Libelant,

UNITED STATES
OF AMERICA,By /s/ CHARLES R. WICHMAN,
Assistant U. S. Attorney.LOUIS A. RODRIGUES,
PATRICK F. TUOHY,
Attorneys for Respondent;

By /s/ PATRICK F. TUOHY,

[Endorsed]: Filed August 8, 1956. [18]

[Title of District Court and Cause.]

DECISION

The United States of America as libelant filed a libel of information under the provisions of 18 USCA § 492 against 3,827 coins "being likenesses of the 1847 'Hapa Haneri' issued by the Hawaiian Government," the possession of which it was alleged violated 18 USCA § 489.¹ The libel prayed for for-

¹Section 489 reads:

"Whoever, within the United States, makes or brings therein from any foreign country, or possesses with intent to sell, give away, or in any other manner uses the same, except under authority of the Secretary of the Treasury or other proper officer of the United States, any token, disk, or device in the likeness or similitude as to design, color, or the inscription thereon of any of the coins of the United States or of any foreign country issued as money; either under the authority of the United States or under the authority of any foreign government shall be fined not more than \$100."

feiture of the coins and their disposition pursuant to law.

In February, 1956, a special agent of the United States Secret Service Field Force seized the respondent coins, claiming them forfeited in violation of the sections cited above. The coins were in the possession of Barney A. Gertz, who was responsible for their manufacture and who intended to sell them as souvenirs. The court accepted a stipulation that Gertz had no intention to defraud or cheat any prospective purchasers, although that is not an issue in the case.

Respondent coins resemble very closely the "Hapa Haneri" copper penny issued by the Kingdom of Hawaii in 1847. They were, in fact, so intended and so ordered, with certain slight variations, which are: a different metal is used in the respondent coins, and they are slightly thinner than the genuine coins; the facings on the respondent coins are reversed from the "Hapa Haneri," i.e., when turning the coins over, the [20] reverse side of the respondent coins will appear upside down; and on the respondent coins, in print so minute as to remain unseen without careful examination, are the words, "Souvenir Alii of Hawaii." The evidence is convincing that the respondent coins are likenesses or similitudes of the 1847 "Hapa Haneri."

The evidence showed that the "Hapa Haneri" coin was issued as money by the Kingdom of Hawaii in 1847. The 2nd Act of Kamehameha III, entitled "An Act to Organize the Executive Departments of

the Hawaiian Islands," enacted April 27, 1846, authorized the issuance of coins such as the "Hapa Haneri." The coins were minted the following year and placed in circulation as genuine money of the Kingdom.

Counsel for the respondent coins urged that the coins are not within the proscription of Section 489 because the Kingdom of Hawaii is not now a foreign government or country within the meaning of the statute, or to put it another way, that Section 489 may only be construed to apply to an "existing" foreign country or government. The Assistant United States Attorney contends on behalf of libellant that the statute is broad in its terms and that any coin "issued as money * * * under the authority of any foreign government" necessarily includes the respondent coins.

The Court takes judicial notice of the following historical facts:

On October 8, 1840, the first Constitution of the Kingdom of Hawaii was proclaimed by King Kamehameha III. Following the lead of the United States of America, France and Great Britain in November, 1843, united in a joint declaration recognizing the independence of the Kingdom of Hawaii. Her status as a [21] sovereign nation continued until the annexation of the Republic of Hawaii to the United States of America by virtue of a Joint Resolution adopted on July 8, 1898. In April, 1900, Congress enacted the Hawaiian Organic Act, which established a territorial form of government in Hawaii,

a status which has remained unchanged since that date.

An early case, *United States vs. Arjona*, 120 U. S. 479 (1887), points up the need for and validity of laws of the United States which protect the integrity of money, notes or other securities issued by or under the authority of foreign sovereign governments. The rationale of that case, coupled with the definition of "foreign government" found in 18 USCA § 11,² led to the conclusion that respondent coins were not issued as money under the authority of a foreign government contrary to the provisions of Section 489.

Because of the chain of historical events summarized above, the Kingdom of Hawaii cannot possibly be considered as a "foreign government" in the year 1956. It no longer exists. After a long courtship,³ the engagement was announced in 1898,

²Section 11 reads:

"The term 'foreign government,' as used in this title, includes any government, faction, or body of insurgents within a country with which the United States is at peace, irrespective of recognition by the United States."

³Page 7, Revised Laws of Hawaii, 1935, Act 86, Session Laws of Hawaii, 1923, approved April 26, 1923 (part of Section 2):

"The annexation of Hawaii was first formally considered between the governments of Hawaii and of the United States in 1853-54.

"At that time President Pierce of the United States instructed Secretary of State Marcy to commission D. L. Gregg to represent the United States

followed by the wedding in 1900, which forever ended the existence of a proud and noble sovereign nation whose place in the nations of the world had been completely recognized by all other foreign governments up to the date of the final ceremony.

The libel of information is dismissed, and the respondent coins will be returned to their owner.

Dated at Honolulu, Hawaii, this 3rd day of October, 1956.

/s/ JON WIIG.

[Endorsed]: Filed October 3, 1956. [22]

in Hawaii, to negotiate with Kamehameha III, king of Hawaii, for the annexation of Hawaii to the United States.

“The treaty was negotiated upon the basis of Hawaii coming into the Union as a State, ‘enjoying the same degree of sovereignty as other States, and admitted as such * * * to all the rights, privileges, and immunities of a state, on a perfect equality with other states of the union.’

“(See records of the United States State Department and *Downes vs. Bidwell*, 182 United States Supreme Court Reports 244 at 305.)”

In the United States District Court for
the District of Hawaii

Civil No. 1474

UNITED STATES OF AMERICA,

Libelant,

vs.

3,827 COINS, Being Likenesses of the 1847 "Hapa
Haneri" Issued by the Hawaiian Government,

Respondent.

JUDGMENT AND ORDER RETURNING
SEIZED PROPERTY TO OWNER

This cause came on for trial before the Court on September 14, 1956, upon the libel of information filed by the United States; the answer of claimant, Barney A. Gertz, and stipulation of facts filed August 8, 1956; the parties being represented by counsel;

Whereupon, the Court, after having heard the testimony and having weighed the evidence adduced in open court and the entire record, made its oral decision, finding that the respondent 3,827 coins were likenesses of the 1847 "Hapa Haneri" coins issued as money by the Hawaiian Government, and ordered the respondent coins forfeited; and

Thereafter, the Court, on its own motion for reconsideration, reconsidered its position, and a hear-

ing on the court's motion was had October 3, 1956, counsel for both parties being present;

Whereupon, the court, after hearing argument resisting the court's motion, by the United States Attorney's office, rendered its decision, finding:

That respondent coins are likenesses of the 1847 "Hapa Haneri" coin, which coin was issued as money under the authority of the Kingdom of Hawaii; but that the Kingdom of Hawaii, in the year 1956, cannot be considered a "foreign government" as that term is used in Title 18, United States Code, Section 489. Therefore, [25] respondent coins do not come within the provisions of Title 18, United States Code, Section 489.

Now, Therefore, It Is Ordered, Adjudged and Decreed that the libel of information is dismissed, and the respondent coins will be returned to their owner.

Dated at Honolulu, Hawaii, this 1st day of November, 1956.

/s/ JON WIIG,

United States District Judge.

[Endorsed]: Filed November 1, 1956. [26]

In the United States District Court for
the District of Hawaii

Civil No. 1474

UNITED STATES OF AMERICA,

Libelant,

vs.

3,827 COINS, Being Likenesses of the 1847 "Hapa
Haneri" Issued by the Hawaiian Government,

Respondent.

NOTICE OF APPEAL

Notice is hereby given that the United States of America, Libelant, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the Judgment and Order entered on November 1, 1956, in this action.

Dated: Honolulu, T. H., this 31st day of December, 1956.

LOUIS B. BLISSARD,
United States Attorney, District of Hawaii, At-
torney for Libelant,

By /s/ CHARLES R. WICHMAN,
Assistant U. S. Attorney.

[Endorsed]: Filed December 31, 1956. [28]

[Title of District Court and Cause.]

ORDER EXTENDING TIME FOR FILING
RECORD AND DOCKETING APPEAL

On application of the United States of America, Libelant above named, the Court being fully advised, It Is Ordered that the time for filing the record on appeal with the United States Court of Appeals for the Ninth Circuit, and for docketing therein the appeal taken by the United States of America by notice of appeal filed December 31, 1956, is extended to March 11, 1957, pursuant to Rule 73(g) of the Federal Rules of Civil Procedure.

Dated: Honolulu, T. H., this 6th day of February, 1957.

/s/ J. FRANK McLAUGHLIN,
Judge, United States District Court for the District
of Hawaii.

[Endorsed]: Filed February 6, 1957. [30]

[Title of District Court and Cause.]

ORDER EXTENDING TIME FOR FILING
RECORD AND DOCKETING APPEAL

On application of the United States of America, Libelant above named, the Court being fully advised, It Is Ordered that the time for filing the record on appeal with the United States Court of Appeals for the Ninth Circuit, and for docketing therein the ap-

peal taken by the United States of America by notice of appeal filed December 31, 1956, is extended to March 31, 1957, pursuant to Rule 73(g) of the Federal Rules of Civil Procedure.

Dated: Honolulu, T. H., this 6th day of March, 1957.

/s/ J. FRANK McLAUGHLIN,
Judge, United States District Court for the District
of Hawaii.

[Endorsed]: Filed March 6, 1957. [34]

[Title of District Court and Cause.]

ORAL RULING ON RESPONDENT'S
MOTION TO DISMISS

Before: Hon. John Wiig, Judge.

May 23, 1956

I have permitted counsel to argue on this motion beyond the scope of the motion itself by making reference to evidentiary matters. However, they can have no influence on the Court in ruling on the motion because the only problem at the present time is whether or not taken on its face the libel of information states a claim upon which relief could be granted.

A careful examination of the libel, the allegations of the libel, shows that the likenesses of the hapa haneri were seized, forfeited to the United States

for a violation of section 489 of title 18 and that is the gist of the libel, coupled with the allegation that Barney Gertz had these coins in his possession in a manner in violation of section 489. [42]

The allegations of the information, if proved to be true, would be sufficient to authorize a forfeiture of the coins. But I have not yet received proof of the allegations contained in the information. The fact does appear, however—and could not be changed at the trial of this case—that the words “Souvenir, Alii of Hawaii” on the reverse side of the coins is in such fine print and indentation or raising—I can’t tell which—that it just is not observable to a person who would look at it in a casual or even in a rather careful manner. And the similarity to the original hapa haneri which—by the way, do counsel know what hapa haneri means?

Mr. Rodrigues: As far as we can determine, it is part of a dollar. We thought it was a half a dollar, but it is part.

The Court: It is half a hundred. And according to one source it should read hapa haneli because there was no “R” in the Hawaiian language at that time. I don’t know whether these were sent to the United States at that time for coining or what happened in the spelling, but it is not unusual that the “R” is used for the “L” or that the “R” was used where the “L” should have been.

The motion to dismiss the information is denied and the respondent will have one week within which to file a pleading in accordance with the rules of civil procedure.

March 13, 1957.

/s/ ALBERT GRAIN,
Official Court Reporter.

[Endorsed]: Filed March 13, 1957. [43]

In the United States District Court for
the District of Hawaii

Civil No. 1474

UNITED STATES OF AMERICA,

Libelant,

vs.

3,827 COINS, Being Likenesses of the 1847 "Hapa
Haneri" Issued by the Hawaiian Government,

Respondent.

TRANSCRIPT OF PROCEEDINGS

In the above-entitled matter, held in the U. S.
District Court, Honolulu, T. H., on September 14,
1956, commencing at 10:00 o'clock a.m.,

Before: Hon. Jon Wiig, Judge.

Appearances:

CHARLES R. WICHMAN,
Assistant United States Attorney,
Appearing for Libelant.

PATRICK F. TUOHY, ESQ.,
Appearing for Respondent.

September 14, 1956, 10:00 A.M.

(Case called.)

Mr. Wichman: Ready for the libelant.

Mr. Tuohy: Ready for the respondent. Before we get started, your Honor, I would like to state that we have entered into a stipulation with the government on the facts in this case. However, I should like to make our position clear in that we do not stipulate that Hawaii is such a foreign government as comes under the section of the Title 18 of the Criminal Code.

The Court: I read the stipulation, and it was not too clear in my mind whether you had agreed to that. But you want to make your position clear that you have not so stipulated?

Mr. Tuohy: Yes, sir.

The Court: Mr. Wichman, is that your understanding?

Mr. Wichman: That is my understanding of the stipulation, your Honor. However, it is also my understanding that that was an issue before the Court in the motion to dismiss and the Court ruled that it was such a coin as came within the provisions of that statute on the motion to dismiss.

Mr. Tuohy: Your Honor, I don't believe that was the Court's ruling at all in the motion to dismiss. The ruling on the motion to dismiss was that the indictment was sufficient to—the facts set forth in the indictment were sufficient [2*] to proceed fur-

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

ther in this matter. There was no determination by the Court as to the status of Hawaii being a foreign government.

The Court: I don't recall, Mr. Wichman, that I made a finding to that effect.

Mr. Wichman: Well, as to the matters of law the Court ruled, put it that way.

The Court: Well, I can rule on a matter of law on matters of which I can take judicial notice at the time.

Mr. Wichman: In other words, the ruling of the Court was that the libel of information stated a good cause of action if we were able to prove the facts contained within the libel.

The Court: Well, the motion to dismiss is the equivalent of a demurrer, and I went on that assumption for the purposes of the motion to dismiss.

Mr. Wichman: And as I recall, your Honor, that was specifically a question which we argued to the Court, as to whether they came within the provisions of Section 489 of Title 18.

Mr. Tuohy: If the Court please, I believe at that time when we argued on the issue of foreign country you did not rule, and that instead you treated the motion to dismiss as a demurrer and ruled that the motion to dismiss was not proper since the allegations set forth in the libel of information [3] were sufficient to sustain it, but you did not rule on all of the facts set forth in the libel. I don't think that is the purpose of the ruling on the motion to dismiss.

The Court: I don't think it was necessary for me to rule as to a matter of law. I held that the libel of

information stated a cause of action against the respondent. That is my recollection of it. Are you ready to proceed?

Mr. Wichman: Ready for the government.

The Court: Very well.

Mr. Wichman: I would like to call as my first witness Mr. Chang.

EUGENE CHANG

called as a witness on behalf of the libelant, being first duly sworn, testified as follows:

Direct Examination

By Mr. Wichman:

Q. State your name, please?

A. Eugene Chang.

Q. And where are you employed?

A. Employed by the Territorial Public Archives.

Q. I am sorry. I can't hear you.

A. By the Territorial Public Archives.

Q. And are you appearing in response to a subpoena directed to Agnes C. Conrad, Archivist of the Public Archives? A. Yes, sir. [4]

Q. And you were designated by her to appear?

A. Yes, sir.

Q. And did you bring the items requested in the subpoena, the 2nd Act of Kamehameha III, entitled "Act to Organize the Executive Departments of the Hawaiian Islands," enacted 27 April, 1846?

A. Yes, sir.

Q. Have you got that volume there?

(Testimony of Eugene Chang.)

A. Yes, sir.

Q. And this volume is part of the records of the Public Archives, Territory of Hawaii?

A. Yes, sir.

The Court: The Archives is the public depository of official documents of the Territory of Hawaii?

The Witness: That is right, your Honor.

Mr. Wichman: Your Honor, I would like to call the Court's attention to the 2nd Act of Kamehameha III to which we have just referred, Chapter 4 of part 3, Sections 1 and 2, which we ask the Court to take judicial notice of.

Mr. Tuohy: Your Honor, at this time I would like to object to Mr. Wichman's motion, for this statute or law of the Hawaiian Government is a foreign law in that it was enacted prior to the annexation of the Territory by the United States, and as such is not subject to judicial notice.

The Court: How long are these sections? [5]

Mr. Wichman: The sections are, oh, roughly they take up two-thirds of one page.

The Court: I suggest you read them into the record.

Mr. Wichman: In the alternative, we would offer them in evidence as an official record kept in the Archives. However, we feel that the Court can take judicial notice of the records of the Hawaiian Government, whose successor is, first, the Republic of Hawaii and subsequently the Territory of Hawaii, and whose laws were, by the Organic Act, continued in force, with certain exceptions.

(Testimony of Eugene Chang.)

Mr. Tuohy: May I have a ruling on my objection, your Honor?

The Court: Well, are you now asking me to take judicial notice or are you offering the sections in evidence? The reason I make that suggestion is that that is a very voluminous book, and in order to have it preserved, it should go back to the Archives immediately. And for the purpose of the record, the sections should be in the record.

Mr. Wichman: Well, may I offer it? May I first read it to the Court and ask, first, that the Court take judicial notice of it, but in order to allow the custodian to take it back to the Archives, read the statements that it contains into the record?

The Court: Yes; you may.

Mr. Wichman: From a volume in which is contained [6] the 2nd Act of Kamehameha III, entitled "An Act to Organize the Executive Departments of the Hawaiian Islands," enacted into law 27th day of April, A. D. 1846, signed Kamehameha III, attested John Young, Premier, Chapter 4 of Part 3 entitled, "Of Coins and Currency," Section 1.

"The currency of the Hawaiian Islands shall consist of the dollar, valuing 100 cents. American currency; the half dollar, valuing 50 cents; the quarter dollar, valuing 25 cents; eighth of a dollar valuing twelve and a half cents; and sixteenth of a dollar, valuing six and a quarter cents; a copper coin impressed with the head of His Majesty, surrounded by the words 'Kamehameha III, ka moi'; on the reverse, 'Apuni Hawaii.' Gold and silver coins wear-

(Testimony of Eugene Chang.)

ing the legalized impress of any sovereign states, shall be receivable in payment of dues, duties and taxes, at the exchequer, and in tender or payment of debts contracted by private individuals in this kingdom, at their current or merchantable value, for the time being, at Honolulu, to be established by evidence. In case any of the said coins be refused, the payer having tendered, may bring the same into court, and plead such tender and refusal as a bar of costs as prescribed in the Act to Organize the Executive.

“Section 2. The minister of finance shall cause to be minted for circulation the copper coin as described in the preceding section; and with the advice of two-thirds of the [7] privy council, in approbation of His Majesty, he may also cause to be minted any small silver coins of such descriptions and quantity as said council shall direct.”

We offer the following sections read into the record, your Honor, or we ask the Court to take judicial notice of those, as being the law of the Hawaiian Kingdom, which is the predecessor of the present Territory of Hawaii.

Mr. Tuohy: Your Honor, again I renew my objection that the law is a foreign law in that it was enacted prior to any annexation by the United States and as such is not subject to judicial notice. I think it is clear that the holding is that foreign laws are not the subject of judicial notice.

The Court: I am going to overrule your objec-

(Testimony of Eugene Chang.)

tion. I not only take judicial notice of it, but I will receive it in evidence so there is no question about it, the sections just read by Mr. Wichman from the Act of April 27, 1946.

Mr. Wichman: And may we ask, your Honor, that the volume of the laws containing the sections, Act of Kamehameha III be returned to the custodian for return to the Archives of the Territory of Hawaii?

The Court: Unless Mr. Tuohy has some objection.

Mr. Tuohy: Your Honor, I have no objection to this being returned to the Archives. However, I should like your Honor to reconsider the fact that this is merely a copy of it, not even a certified copy of what the law was at that time. [8] There is no showing that this is an authentic document. The mere fact that it is in a book does not prove the law. This is not a rare book. There are four or five copies over at the Supreme Court. It is not peculiar.

The Court: May I see the volume, please?

The Witness: Your Honor, I think the first of the book is in Hawaiian.

The Court: Yes. I am quite aware of it. I have had considerable experience with the session laws of Hawaii. I am satisfied that, from examination of the volume produced by the witness, it is one of the original copies of the laws as passed through the hands of very distinguished members of this bar who are not alive any more.

(Testimony of Eugene Chang.)

Mr. Tuohy: It is my understanding, then, your Honor, you do not consider it a foreign law?

The Court: It is in evidence. It isn't a question of what I consider it as, Mr. Tuohy. Your objection is overruled.

Q. (By Mr. Wichman): Now, Mr. Chang, did you bring with you in response to the subpoena duces tecum Volume 3, No. 12, of date August 8, 1946, of the Polynesian Magazine from your records? A. Yes, sir.

Mr. Wichman: Your Honor, I would like to read into the record a portion of Volume 3, No. 12, dated August 8, 1846, [9] of The Polynesian.

Mr. Tuohy: If your Honor please, I object to any testimony coming in as to what is contained in this on the ground that it is a copy of a foreign document, and as such it is provided in the Rules as to the procedure in admitting it in court, citing in particular Section 1741 of Title 28, United States Code, which reads as follows:

“A copy of any foreign document of record or on file in a public office of a foreign country or political subdivision thereof, certified by the lawful custodian thereof, shall be admissible in evidence when authenticated by a certificate of a consular officer of the United States resident in such foreign country, under the seal of his office, that the copy has been certified by the lawful custodian.”

The Court: That is the ground of your objection?

Mr. Tuohy: Yes.

(Testimony of Eugene Chang.)

The Court: The objection is overruled.

Mr. Wichman: That portion of volume 3, No. 12 of *The Polynesian* entitled, "Report of the minister of finance read before His Majesty to the Hawaii Legislature, August 1, 1846," the second to last paragraph of that report, which reads as follows:

"The copper coin authorized by the Legislature at the [10] last session has been ordered, and will afford great facility in small business transactions."

We offer, first, that excerpt from *The Polynesian* into evidence and also ask the Court to take judicial notice of it as coming from a document in the official records of the Public Archives of the Territory of Hawaii, and the fact that *The Polynesian* was the official journal of the Hawaiian Government, published weekly at Honolulu, Oahu, Hawaiian Islands.

The Court: The excerpt will be received in evidence.

Q. (By Mr. Wichman): And did you bring with you, Mr. Chang, Volume 3, No. 52, of date May 15, 1847, of *The Polynesian*?

A. Yes, sir. I think it is in that volume.

Q. In the same volume? A. Yes.

Mr. Wichman: May I read into the record at this time, your Honor, from *The Polynesian* of date Saturday, May 15, 1847, being Volume 3, No. 52, from page 212 the following—withdraw that—from page 211, the following excerpt, under the caption, "By authority, Department of Finance, Honolulu, Hawaii, May 10, 1847":

"Pursuant to the provisions of Chapter 4, Part 3,

(Testimony of Eugene Chang.)

of the Act to Organize the Executive Departments, the undersigned has 'caused to be minted for circulation a copper coin as described in the first section of [11] that chapter,' which he has put into circulation as therein prescribed to the extent of an issue of \$1,000.

"Said coin will be accordingly henceforth received throughout this kingdom and at this department 'in payment of government dues, duties and taxes, and in tender or payment of debts contracted by private individuals' at the value of 100 of said coins to the dollar. G. P. Judd, Minister of Finance."

We offer that excerpt from *The Polynesian* of Saturday, May 15, 1847, into evidence and ask the Court to take judicial notice of that publication.

Mr. Tuohy: Your Honor, I object on the ground of hearsay and materiality, and the same objection as to the other, that it is a foreign document and has not been proven.

The Court: Objection overruled. The excerpt will be received in evidence.

Q. (By Mr. Wichman): Did you, Mr. Chang, bring with you Volume 4, No. 2, of date May 29, 1947, of *The Polynesian*? A. Yes, sir.

Mr. Wichman: I am reading into the record from *The Polynesian* of date Saturday, May 29, 1847, Volume 4, No. 2, under the caption, "A report of the Minister of Finance to the Nobles and Representatives of the Hawaiian Islands in Legislative Council Assembled." The 19th paragraph thereof reads as follows: [12]

(Testimony of Eugene Chang.)

“The copper coin to which I referred in my last Report has been manufactured and is expected daily. Owing to the recent large exportation of specie to California and China, the circulating medium was at one time much reduced; but importation of specie have taken place and it is to be hoped that currency will be equal to the wants of commerce.”

Signed G. P. Judd, Minister of Finance, Honolulu, April 28, 1847.

We offer that excerpt into evidence and also ask the Court to take judicial notice of it.

Mr. Tuohy: Same objection.

The Court: The same ruling. The excerpt will be received in evidence.

Mr. Wichman: I have no further questions for the witness.

The Court: Cross-examine.

Mr. Tuohy: No questions, your Honor.

Mr. Wichman: For the record, may the witness be allowed to take back to the Archives with him the volumes he brought with him this morning?

The Court: Yes. You are excused. Thank [13] you.

MRS. CLARENCE HOHU

called as a witness on behalf of the libelant, being first duly sworn, testified as follows:

Direct Examination

By Mr. Wichman:

Q. State your name, please?

A. Mrs. Clarence Hohu.

Q. And where are you employed, Mrs. Hohu?

A. At the Bishop Museum.

Q. And have you appeared today in response to a subpoena addressed to Dr. Alexander Spoehr, Director of the Bishop Museum? A. Yes.

Q. And were you designated by him to appear on his behalf? A. Yes.

Q. Did you bring with you the copper coins bearing on their face the image of Kamehameha III and the words "Kamehameha III, Ka Moi" and on the reverse side a wreath enclosing the words, "Hapa Haneri"? A. I did, sir.

Q. And have you those with you?

A. Yes; I do.

Q. How many such coins did you bring with you? A. Eight. [14]

Q. Eight coins? A. Yes.

Q. And you are handing me a list. What does this list represent?

A. A list of the coins and by whom they were—and who presented them to the Museum and when.

Q. And are the coins separated in any way?

A. Yes; they are.

(Testimony of Mrs. Clarence Hohu.)

Q. How are they separated?

A. In envelopes.

Q. And the reason for that is what?

A. I suppose to keep them intact as separate units.

Q. So you can identify the coin that was given by any particular person, is that right?

A. Yes; that is right.

Mr. Wichman: May I have the paper marked for identification, your Honor, that was handed to me by the witness?

The Court: Yes. It will be marked Exhibit 1.

The Clerk: Exhibit 1 for identification.

The Court: Exhibit 1 for identification.

(The instrument referred to was marked as Exhibit No. 1 for identification.)

Q. (By Mr. Wichman): Reading from Plaintiff's Exhibit 1 for identification, Mrs. Hohu, would you produce the coins listed as No. 9710 presented by Dr. William T. Brigham on [15] March 15, 1910? A. Here.

Mr. Tuohy: If the Court please, to save a little time, we are willing to stipulate that the various coins were presented to the Bishop Museum by the people as set forth in that list.

Mr. Wichman: Well, may I offer the list into evidence, then, on that basis?

The Court: And the coins?

Mr. Wichman: And we also—I anticipate I may have some objection to the introduction of the coins.

(Testimony of Mrs. Clarence Hohu.)

I don't know. But I will offer them as a separate exhibit and request the Court to allow us to withdraw them and submit a photograph, which we had taken this morning of the coins, into evidence in their place so that they may be returned to the Bishop Museum.

Mr. Tuohy: May we have the purpose for which the coins are offered in evidence, your Honor?

The Court: I assume that they are offered by the government for the purpose of helping to prove their case.

Mr. Tuohy: Well, in that event, your Honor, I object to the admission of the coins. There is no foundation laid that they are true and genuine coins of 1846 Hapa Haneri.

Mr. Wichman: If I may be heard as to that, your Honor.

The Court: Yes. [16]

Mr. Wichman: In connection with that, the Revised Laws of Hawaii make the Bishop Museum an official repository for items such as this in the Territory, and as such an item coming from an official repository, such as the Bishop Museum, lends authenticity to the coins. They were held by the Bishop Museum as Hapa Haneri coins issued, and as such we offer them in evidence, coming from an official repository and being similar to the description in the official document coming from the Public Archives of the Territory of Hawaii. I have in mind the statute——

(Testimony of Mrs. Clarence Hohu.)

The Court: I am aware of that statute, Mr. Wichman.

Mr. Tuohy: Your Honor, I object. There is no showing that these are supposedly authentic originals of the Hapa Haneri. The mere fact that they come from the official repository doesn't make them official. And I am sure your Honor is aware that many items contained in the Bishop Museum are not originals. They have replicas of items. There has been no showing here that these are original coins.

The Court: Of course, you appreciate the fact that it would be impossible at this date to have somebody come in and testify that these came from the mint.

Mr. Tuohy: I appreciate that, your Honor, but if we could have at least an expert witness. Mrs. Hohu here is not qualified as an expert witness. I object to the government establishing its case by strictly hearsay. It has been nothing [17] but hearsay all along.

The Court: Do you wish to examine Mrs. Hohu on voir dire?

Mr. Tuohy: If he wishes to present her as an expert witness.

The Court: Well, the only question before the Court is that they have been offered in evidence and you have made your objection and I am giving you an opportunity, on the basis of your objection, to examine on voir dire, if you desire.

(Testimony of Mrs. Clarence Hohu.)

Mr. Tuohy: Mrs. Hohu, are you an expert on Hawaiian coins?

The Witness: No; I am not.

The Court: The coins you brought in here this morning are from the Bishop Museum, and you brought them pursuant to the subpoena directed to Dr. Spoehr?

The Witness: That is correct; yes, sir.

The Court: The objection is overruled. How many envelopes do you have there, Mrs. Hohu?

The Witness: Four within a container.

The Court: Are there two coins in each envelope, or do they vary?

Mr. Tuohy: No. I think it is a combination of 2, 3, 1, 1.

The Court: Very well, the first, the list of donors will be received as Exhibit 1, the envelope containing three [18] coins will be received as Exhibit 2, the one containing two coins as Exhibit 3, and the other two as Exhibits 4 and 5.

The Witness: It is two, three, one, one, one.

The Court: Then another one, Exhibit 6.

(The instruments referred to were marked Exhibits 1, 2, 3, 4, 5 and 6 in evidence.)

Mr. Wichman: I have no further questions for the witness.

The Court: Cross-examine.

(Testimony of Mrs. Clarence Hohu.)

Cross-Examination

By Mr. Tuohy:

Q. Mrs. Hohu, have you seen these coins before at the Museum?

A. Only on exhibition in the Museum.

Q. Do you have any idea of your own as to whether they are original Hapa Haneris?

A. I am afraid not.

Q. You don't know?

A. No; I don't. I wish I were living at the time.

Q. And the only thing that you know with relation to those coins is that the coins in the various envelopes were donated to the Museum by the people on that list?

A. That is right.

Mr. Tuohy: No further questions.

Mr. Wichman: No questions. [19]

The Court: Mrs. Hohu, those coins will be kept in their envelopes and separated as you have them now, and they will be kept in the custody of the clerk of this Court until they are returned to you in the same condition that you brought them here this morning. Thank you. You are excused.

Mr. Wichman: Mr. Bauer.

H. E. BAUER

called as a witness on behalf of the libelant, being first duly sworn, testified as follows:

Direct Examination

By Mr. Wichman:

Q. Would you state your name, please?

A. H. E. Bauer.

Q. Mr. Bauer, how long have you been a resident of the Territory of Hawaii? A. Since 1941.

Q. What is your present occupation?

A. Stamp and coin dealer.

Q. Stamp and coin dealer? A. Yes, sir.

Q. How long have you been a stamp and coin dealer? A. Since '49.

Q. And are you also a collector of coins?

A. I have been all my life, stamps and coins.

Q. Mr. Bauer, how long have you been familiar with [20] Hawaiian coins?

A. Well, I got interested in '41 when I came over here, and studied up on that and bought a few at that time.

Q. Do you know or are you familiar with a coin known as the Hapa Haneri? A. Yes, sir.

Q. How long have you been familiar with that coin A. Well, just since that time.

Q. Since what time? A. About '42 or so.

Q. Since about 1942? A. Yes.

Q. So that you have been familiar with those coins since '42 and have been a dealer in coins and stamps since 19—— A. '49.

(Testimony of H. E. Bauer.)

Q. '49. Do you belong to any coin societies in the Territory of Hawaii?

A. No. The only one was established about a year ago and I did not join.

Q. You did not join that? A. No.

Q. Isn't it true you told me that—when I was talking to you yesterday or the day before, that you were a non-joiner of organizations?

A. I am a no joiner. I don't belong to any organizations. [21]

Q. You don't belong to any organizations?

A. No.

Q. Mr. Bauer, have you given any scientific talks on coins?

A. Well, I wouldn't call them exactly scientific. I gave talks on coins to several YMCA meetings when I was invited to do so.

Q. You were invited to give talks to them?

A. Yes, about three or four, I think, the last few years.

Q. And have you given talks on Hawaiian coins in particular?

A. Yes, they were mentioned quite often.

Q. And have those talks covered the Hapa Haneri coin?

A. Yes. In fact, I took Hawaiian coins along and showed them to the listeners.

Q. Do you have any coins known as Hapa Haneri coins in your possession? A. Yes.

Q. Have any of those coins passed through your

(Testimony of H. E. Bauer.)

hands as a business man dealing in coins and stamps since 1949?

A. Oh, many of them. At one time I sold 400 Hapa Haneris to one man.

Q. I beg your pardon?

A. At one time I sold 400 Hapa Haneris to one man.

Q. In one sale? [22] A. In one sale.

Q. During the course of your collecting and dealing in coins, how many, would you say, how many Hapa Haneri coins have passed through your hands?

A. Oh, I couldn't say; about six or seven hundred.

Q. Have you or do you write any papers or articles on coins, and in particular, Hawaiian coins?

A. Yes. I contribute a weekly coin column to the Star-Bulletin.

Q. How long have you been doing that?

A. Since '49.

Q. How many dealers in coins are there in the City of Honolulu here?

A. Well, many of them dabble in coins, you know. But real coin dealers, I think, are—oh, I would say two besides me.

Q. Two besides you, so three altogether?

A. Let's make it three more. About four altogether.

Q. Mr. Bauer, have you ever been called by any organization to consult on the value or authenticity of Hawaiian coins?

(Testimony of H. E. Bauer.)

A. The Bishop Museum occasionally calls me up and asks for values of Hawaiian coins that were donated to them. And I don't think organizations, but private people I get practically every day inquiries about value of coins, you know. [23]

Q. To have coins appraised by you?

A. Yes.

Q. And have you done any appraisal work for the courts? A. No.

Q. You have not done any appraisal work for the courts?

A. No, because I am a no joiner, I don't apply for the thing at all.

Q. As a prerequisite to determining the value of a coin, must you also determine its authenticity?

A. Yes.

Q. And you have been consulted in such matters by the Bishop Museum, is that correct?

A. Yes.

Q. Have you had any other dealings with Hawaiian coins about which I have not asked you that gives you some further background in connection with your knowledge of Hawaiian coins?

A. Well, having a store, I naturally have many collectors coming in, many mainland collectors and some very good experts, and in conversation with them we discuss quite often Hawaiian coins, because they are getting very popular now on the mainland.

Q. So you have entered into conversations with other collectors with regard to Hawaiian coins?

(Testimony of H. E. Bauer.)

A. Yes.

Q. Have you sold any Hapa Haneri coins? [24]

A. Yes. I just told you, 400 in one sale, and many, many others, because for awhile all dealers here offered complete sets of Hawaiian coins from the dollar down to the penny, and I sold at that time quite a few, at least one a week, you know. But the penny is getting now rather scarce and so our sets usually consist only of the silver coins of 1883.

Q. Mr. Bauer, when you sell coins, Hapa Haneri coins, have you sold them as genuine originals as opposed to copies?

A. Well, naturally, as far as I know, I only sell originals. I have seen—not on Hapa Haneri, but other coins—fakes, which I do not sell, the same as stamps, I refuse to sell. But when I sell a coin or stamp, I am convinced it is genuine, and I have a long experience, as I have been a collector.

Q. So that these coins that you say you have—Hapa Haneri coins that you have sold, you have made a determination that they were genuine originals and sold them as such, is that correct?

A. Yes, I was of the—convinced that they were originals.

Mr. Wichman: Your Honor, we offer Mr. Bauer as an expert in the field of Hawaiian coins and particularly with regard to the Hapa Haneri coins.

Mr. Tuohy: Your Honor, I would like to be permitted to question Mr. Bauer. [25]

The Court: You may, Mr. Tuohy.

(Testimony of H. E. Bauer.)

Voir Dire Examination

By Mr. Tuohy:

Q. Mr. Bauer, you stated that any coin that you sold, it was your belief and conviction that it was a genuine coin? A. My belief, yes.

Q. Now, in regards to a Hapa Haneri, how would you arrive as to the authenticity of a coin of that denomination?

A. Well, it can only be established by the coins we had in our possession, naturally, taken for granted that they were genuine. But that doesn't state that the thing cannot be faked, or hasn't been faked. Many coins, many stamps, have been faked a short time after they came out, so that an 1847 coin, I couldn't swear that there was nobody here on the island or on the mainland who made a replica of that, you know. But in most cases, coins, the genuine coin can be told by the sharpness of the die, which usually fakers do not get, and in most cases they also fall down on some little detail which the experts usually detect. So I am under the conviction that all coins, all Hapa Haneris I sold were genuine. But, as I say, whether they were faked a short time after they came out, that I could not tell.

Q. In other words, you have no way of knowing whether or not every Hapa Haneri coin that passed through your hands was genuine or not? [26]

A. Well, I am of the conviction that my coins I sold were genuine.

(Testimony of H. E. Bauer.)

Q. That is only based on the fact that——

A. But then Rembrandt's paintings were sold as genuine and after many years it was discovered that somebody else painted them, you know.

Q. The question I want answered, Mr. Bauer, is that you could be wrong in saying that, you could be wrong as to the authenticity of any Hapa Haneri coin that passed through your hands so far, couldn't you; isn't that possible?

A. Well, that is possible.

Q. And in your experience as a coin collector and a coin dealer, isn't it usual on coins that are in current use, or nearly current—in other words, just go out of circulation, aren't there a set of standards set up for that particular coin as to the weight of the coin, the metal content of the coin?

A. Oh, yes. And that we—by that we can usually tell the genuine coin from the other one, because it is different in weight and different metal.

Q. Now, was there any standard that you know of set up for the Hapa Haneri?

A. I do not know the weight, but I think if I can get a Hapa Haneri and a fake, I could tell.

Q. But you wouldn't know how much the original weight was? [27]

A. No, I do not know.

Q. There is no set of standards available?

A. Well, I guess somebody weighed them, the original. There is very little official information obtainable, you know, about the original coinage. But I suppose somebody has weighed it. But I

(Testimony of H. E. Bauer.)

couldn't tell you how heavy it is. I suppose it is about as heavy as the United States large cents which were in use up to 1854. And I suppose the Hapa Haneri is about the same weight.

Q. Were you approached by Mr. Wichman here to testify in this case?

A. Yes. He came to my store day before yesterday and asked me what I know about Hawaiian coins, whether I would qualify as an expert and so on. And I showed him the one Hapa Haneri I have.

Mr. Tuohy: No further questions, your Honor.

The Court: Yes. I have another matter on at 11 o'clock. I don't think it will take long. I will continue this case until 5 minutes after 11:00, at which time I will rule on the qualifications of the witness. The court will stand at recess.

(Recess.)

The Court: Mr. Wichman, do you have any additional questions you wish to ask concerning Mr. Bauer's qualifications as an expert? [28]

Mr. Wichman: None concerning his qualifications as an expert.

The Court: Mr. Bauer, do you have any reason to believe that the Hapa Haneri which have passed through your hands were not authentic?

The Witness: No. I think they were.

The Court: You applied the same standards in determining that as you did in determining the authenticity of other coins?

(Testimony of H. E. Bauer.)

The Witness: Yes, sir.

The Court: I find the witness qualified as an expert.

Mr. Tuohy: May I enter an objection to the Court's ruling at this time?

The Court: Yes. The objection is overruled. I will ask counsel to handle those inner envelopes with care so that they are not intermingled or mixed up.

Mr. Wichman: May I have a moment to arrange these, your Honor?

The Court: Yes.

Direct Examination

(Continued)

By Mr. Wichman:

Q. Mr. Bauer, I show you Exhibit 2 in evidence and ask you to inspect those coins? A. Yes.

Q. In your opinion, Mr. Bauer, are those [29] genuine Hapa Haneri coins?

A. Yes. To my best knowledge they are genuine Hapa Haneris.

Q. I beg your pardon? A. Yes.

Q. Mr. Bauer, a coin, a genuine Hapa Haneri such as you just testified Exhibit 2 was, what would be the value at the present time?

A. At the present time the market is about \$5, and those are in fine condition, those that you showed me.

Q. Those in Exhibit 2 are in fine condition?

A. Fine condition. They are not perfect because

(Testimony of H. E. Bauer.)

they are scratched. They have been cleaned, because many of them have been corroded. They were corroded and people tried to get that off. They cleaned it, and that—the coin shows that.

Q. I show you Exhibit 3 and ask you as to whether you are able to determine the authenticity of those coins?

A. Yes, I believe them to be genuine.

Q. In your opinion those are genuine coins?

A. Yes.

Q. And I ask you the same question in connection with Exhibit 4.

A. Yes, the same here.

Q. And the same question in connection with Exhibit 5.

A. This is not a Hapa Haneri. May I have one of those [30] others back, please? If not, I have one of my own in my pocket, but I don't want to mix them up.

Q. I hand you back, Mr. Bauer, Exhibit 4.

A. This coin evidently had been buried and was badly corroded and then cleaned in a very bad manner so it lost all of its sharp features which a good coin should have. That is why I hesitated in the beginning. But I think that is copper all right. Yes, I think it is just mistreated. That is a real coin.

Q. Your opinion then is that the coin, for the record, that has the star on one side——

A. That is not a Hapa Haneri.

Q. That is not a Hapa Haneri?

A. That is not a Hapa Haneri. That is a twelve

(Testimony of H. E. Bauer.)

and a half cent piece. That was at the time the wage for labor, and private concerns brought them out to pay off labor, and they had to spend these coins in their stores, in the company stores, you know. That is not a Hapa Haneri. That is a twelve and a half cent piece. That was made much later than these.

Q. And the other coin in Exhibit 5 is a genuine Hapa Haneri?

A. I think so. It is just mistreated. That one lost all of the sharpness of features which a good coin should have.

Q. I show you Exhibit 6 and ask you whether you are able to determine the authenticity of that coin. [31]

A. Yes. That is a very nice one. That is in my opinion a genuine coin.

Q. A genuine Hapa Haneri? A. Yes.

Q. Mr. Bauer, are you acquainted with how many Hapa Haneri coins were issued, genuine Hapa Haneri.

A. Well, we heard before that—from the record you read, 100,000 was made or 10,000 I forget now. But, naturally, many of them got lost in fires and earthquakes and so on. So I couldn't tell how many are in existence now, you know. But they are getting very scarce now.

Q. You have handled during your period of knowledge about the coins approximately six or seven hundred?

A. Six or seven hundred Hapa Haneris.

Q. Mr. Bauer, do you know whether all Hapa

(Testimony of H. E. Bauer.)

Haneri are identical or are there differences between—

A. Well, in most large coinages, especially at that time, when they didn't have these high powered machines, you know, they made different—several dies to strike the coins, and, naturally, being made by hand, there is always a little variety and things that happen even in some modern times, modern coins, when they need new dies. It is impossible to get the same markings, and, therefore, it is either in spacing of words or in particular letters, some are a little heavier than others, and especially in this particular one, Hapa Haneri, [32] it is in the date, 1847, that the "7" is different on some than on others, you know, and also, I think, the "4." There are a few varieties, you know, and some collectors go in for those things and want the complete set, you know. But as a rule, dealers don't bother too much with them. A Hapa Haneri is a Hapa Haneri.

Q. You don't go in for those?

A. I don't go in for those things. Let the other fellow get the headaches.

Q. Can you describe for us what these variations are?

A. Well, especially, as I say, it is in the date "1847," and you may find some in there, if you compare the "7" and the "4." It is different on some of them. And also the spacing, because as I say, these dies were made by hand by engravers, you know, and they cannot get exactly the same thing all the time.

(Testimony of H. E. Bauer.)

Q. How many different variations are you aware of, Mr. Bauer?

A. Well, I know of two good ones, I mean, that can be detected easily. But some go over the things with their magnifying glasses have found four or even more variations. It all depends on the number of dies that they used. And, as I say, the records are not available. Because each die is different, will be different from the other. But I think about four is as good a guess as any. [33]

Q. These two that are readily detectable, could you describe what they are?

A. Well, if I can have them to compare, I could—it is the difference, as far as I know, it is between the “47.”

Q. I see. Let me show you Exhibit 2 and ask you whether you find any variation between the two coins in that?

A. Well, they seem to be pretty much alike. The “8” is a little—in one of them is a little lop-sided, not as in the other, you know. That may be one of the several variations that are on this coin.

Q. Anyway, that is the type of variation you are speaking of, is that correct? A. Yes.

The Court: Handle those like you would a new phonograph record.

The Witness: Yes, because the oil of your hand leaves a spot on the coin, you know.

The Court: Yes.

Q. (By Mr. Wichman): I show you another

(Testimony of H. E. Bauer.)

coin, Mr. Bauer, and ask you whether this is a genuine Hapa Haneri?

A. Oh, no. This is a metal. I wouldn't call that a coin. It is different metal, different color, different weight, and, also, the reverse is the same as the obverse of the coin, while on other coins it is just the opposite, you know. And then I can see down here "Souvenir of Hawaii." That is [34] not a coin; that is just a fake or metal, whatever it is.

Q. That is not a genuine Hapa Haneri?

A. No, that is not.

Q. Taking Exhibit 4, you say that one of the differences is the back and the face are not reversed, is that correct?

A. Yes. Now, you see, in this coin here, if you turn it over that is upside down—that is up, and here it is upside down.

Q. You are referring to Exhibit 4 as having the face of one side being upside down in relation to the other side, is that correct?

A. The other side. And here they are both alike.

Q. In connection with the one you say is not a Hapa Haneri, the top side is the same as on the bottom side, the same on both sides?

A. That is absolutely right. I don't think that any collector can ever be fooled or any dealer can be fooled by that thing.

Mr. Wichman: Your Honor, for the record, may we have the coin just shown Mr. Bauer and identified as not being a Hapa Haneri identified for the

(Testimony of H. E. Bauer.)

record as one of respondent's coins concerning which this case involves.

The Court: Yes. It will be marked as Exhibit 7.

(The instrument referred to was marked as Exhibit 7 in evidence.) [35]

Mr. Wichman: I have no further questions for the witness.

The Court: Mr. Tuohy.

Cross-Examination

By Mr. Tuohy:

Q. When you speak of the authenticity of a coin or the genuineness of a coin, what do you mean?

A. Well, that is—everything that you get, whether old Chinese porcelain, whatever it is, you know, there are certain facts that you know and certain descriptions that have been—come over a time, you know, and people who study that think they can tell the genuine from the fake. But as I said before, many things have been faked and some people have been duped, but as far as I know from my experience, the Hapa Haneris that I had were genuine. And I can only base it on experience. I don't know what I can tell you.

Q. In other words, you do not know whether these coins which you identified as authentic Hapa Haneri, you don't know in fact that they are genuine, do you?

A. Well, what I want to say is this: As I told you before, many things have been faked and

(Testimony of H. E. Bauer.)

copied right after they came out. And there is no saying that some wise guy may, say, in 1855, have brought out 100,000 Hapa Haneri. I couldn't swear that that didn't happen.

Q. And also you don't know whether these coins which [36] you identified as genuine Hapa Haneri, you don't know whether they were minted at the same time?

A. No. There is no way of telling that, either.

Q. In other words, you cannot testify actually as to the genuineness of the coins because you don't know; isn't that true?

A. Well, based on my experience and handling of these coins, these are the ones that I always considered to be genuine.

Q. In other words, these are the ones that you saw the most of, isn't that what you base your opinion on? A. Yes.

Q. And they could be counterfeit from the very beginning, and you would have no way of knowing that? A. That is true.

Q. Now, this coin, Mr. Bauer, Plaintiff's No. 7, I show it to you again and ask you in your mind do you think that anybody could be fooled by that coin?

A. I don't think so. Absolutely no. I mean, naturally, I suppose if a stranger came over and is Hell-bent—excuse me—he wants to get a Hapa Haneri, you know—but if he turns it over and sees on there “Souvenir”——

(Testimony of H. E. Bauer.)

Q. You mean these big letters on the bottom here?

A. Yes, I can see them. I don't need the magnifying glass. I can see that it is there. And I don't think anybody [37] can be fooled by that.

Q. Nobody would be fooled?

A. I don't think so.

Q. And, Mr. Bauer, you testified as to the value of these genuine Hapa Haneri. Now, can you tell me what the face value is? I don't mean the collector's value.

A. It is just a penny. In this particular case, the "Hapa" means "fraction," and Haneri is "a hundred." It is a fraction of a hundred. And it was at that time regarded as a penny. It is the same size as the United States large cent which was in circulation at that time, you know. The face value is just a penny.

Q. Do you know, are these in circulation? Would these be accepted in circulation?

A. No, no.

Q. They are not in circulation?

A. No. In fact, since 1900 no Hawaiian coins could be passed here at all, you know.

Q. You say no Hawaiian coins could be passed?

A. No.

Q. Here since 1900?

A. No. In fact, the government called them back you know, all the dollars and so on. They melted 800,000 silver dollars out of a coinage of 1,000,000. So they don't allow them, if they turn up at the bank, because they are about the [38] same size—

(Testimony of H. E. Bauer.)

the quarters and half dollars and dimes, exactly the same size as our currency. But as soon as they turn up in the bank, they are sent back to Washington.

Q. Do you know whether any Hawaiian coins are redeemable at face by the government?

A. No, they are not redeemable.

Q. That is a flat statement, they are not redeemable?

A. Yes.

Q. With any governmental agency?

A. Yes, they will not redeem them.

Q. Are you familiar, Mr. Bauer, with the section of the United States Code that provides specifically for the redemption of Hawaiian coins by the government—by the United States government, rather?

A. No, I am not. If there was such a redemption clause, it was set for a certain time to give people in Hawaii who had Hawaiian coins a chance to turn them in. But I am sure you cannot do it now.

Q. Mr. Bauer, going back to the Hapa Haneri coin, you stated when you were being qualified here that you made an extensive study of Hawaiian coins and that you were very familiar with them, basing your statement on your study back to 1941. Can you tell the Court the extent of your studies with relation to the Hapa Haneri coin and what specific works you referred to to establish your— [39]

A. Yes. Well, I did read up—there are some books at the Hawaii section of the library which I got out. I read up on Thrum's Annual, which brought the—quite a bit about the coinage of

(Testimony of H. E. Bauer.)

Hawaiian coins. But I also had, perhaps, more experience than any other because, I told you—in fact, I bought 500 of the things at one time, and I sold 400 to one man. So I went over each one of them to pick out the ones that were good, that I wanted to keep. So I think I handled more Hapa Haneris than, perhaps, anybody here in the islands, I mean, any dealer.

Q. You mean since 1941? A. Yes.

Mr. Tuohy: Your Honor, at this time I would like the Court to take judicial notice of its own code, and I am at a loss. I had the section of the Code with reference to redemption.

The Court: Oh, I always do that. I think you brought that up on a prior hearing.

Mr. Tuohy: I would like to inform Mr. Bauer that there is a section providing for redemption of coins.

The Witness: I don't think anybody would redeem them because they have much more value than the government will pay for them.

The Court: He is even an expert on law.

Q. (By Mr. Tuohy): Mr. Bauer, when you stated that you [40] know there were 100,000 of these Hapa Haneri coins issued, you don't know whether these coins were the ones issued, do you?

A. No. I wasn't there.

Mr. Tuohy: No further questions, your Honor.

Mr. Wichman: I have no further questions.

The Court: I would like to ask a question, Mr. Bauer. That fake coin, as you called it, on your

(Testimony of H. E. Bauer.)

direct examination you said that no collector would have been fooled with it.

The Witness: Yes.

The Court: How about an average person who might visit Hawaii and want to pick up some coins and you had a dealer who was not ethical; what are the chances of palming it off?

The Witness: Well, I think that the legend at the bottom, "Souvenir coin," condemns the coins as a coin, you know. It is just a souvenir thing, you know, and I think people, unless they have very poor eyesight, will see that, and I don't think that any dealer would dare to palm it off as the real thing.

The Court: We had a hearing on this case some time ago, and I have to use reading glasses. Without glasses, which I do not carry all the time with me, I do not see them. I notice that you have excellent eyes with the glasses you wear.

The Witness: Yes. I have sharp eyes.

The Court: You are talking now about a reputable [41] dealer. You don't think a reputable dealer would pass such a coin.

The Witness: Oh, I don't think any dealer—in fact, I think they will put up signs, "Souvenir coins of Hawaii," or something like that, and sell them for 50 cents. I don't know what the price is. But I don't think that anybody would dare put that over, because it is ridiculous, it is not a coin.

The Court: Well, there are lots of coins, paper

(Testimony of H. E. Bauer.)

bills, that come up every year that are not authentic and fool you.

The Witness: Oh, yes. But I think that little legend says quite enough. It would have been better, perhaps, if it was a little bigger. I don't know.

The Court: Are there any questions based on the Court's examination?

Mr. Wichman: No questions.

The Court: Mr. Tuohy?

Mr. Tuohy: No questions.

The Court: You are excused. Thank you, Mr. Bauer.

Mr. Wichman: We have no further evidence, your Honor.

The Court: Is there any evidence on behalf of the respondent?

Mr. Tuohy: Yes, your Honor. I would like to call Mr. Gertz to the stand. [42]

BERNARD GERTZ

called as a witness on behalf of the respondent, being first duly sworn, testified as follows:

Direct Examination

By Mr. Tuohy:

Q. Will you please state your name?

A. Bernard Bertz.

Q. Mr. Gertz, what is your occupation?

A. Wholesale merchant, primarily in the souvenir business.

Q. Pardon?

(Testimony of Bernard Gertz.)

A. Primarily in the souvenir business.

Q. Do you work for anyone or are you self-employed? A. Self-employed.

Q. Mr. Gertz, I would like to ask you at this time to tell the Court all of the circumstances attendant upon you bringing into the Territory of Hawaii these souvenir coins.

Mr. Wichman: Just a minute. I will object to that, incompetent, irrelevant and immaterial and completely beyond the issues that are presented to the Court by the stipulation and the libel of information. There is nothing pertinent or relevant in how the coins got here. It is the existence and the possession of them that is the offense, and all of that is already stipulated as evidence. The only two issues before the Court are as brought forth in the stipulation of facts.

Mr. Tuohy: If your Honor please, I want to bring out [43] to the Court the intent of the party when he brought the coins in here. I think that is one of the primary issues involved. There is no stipulation as to his intention.

The Court: I don't think that is relevant, Mr. Tuohy. The only questions before the Court are whether or not the respondent coins are likenesses of the 1847 Hapa Haneri, and whether the Hapa Haneri was issued as money by the Hawaiian Government.

Mr. Tuohy: If your Honor please, this libel of information was based on a violation of Section 489 of Title 18, U. S. Code, which section governs

(Testimony of Bernard Gertz.)

counterfeiting. I don't want to get into our argument again that we had on our motion to dismiss, but I am going on the assumption that the counterfeiting is involved, and one of the major requisites of the offense of counterfeiting is intent to deceive. I think that Mr. Gertz should be given the opportunity to be heard. Apparently, we are on a different basis again as to which section governs. I fully realize this is a civil procedure, but it is brought under the counterfeiting section of the criminal code.

Mr. Wichman: Your Honor, if I may be heard on that, it is not accurate to say that a proceeding is brought under the counterfeiting section in that it is brought under Section 489. The counterfeiting of coins is governed—Gold and silver coins or bars is governed by Section 485, the uttering of those coins by 486, the dies and possessing dies 487 and [44] 488; you get to 489 and it is making or possessing of likenesses of coins, and that is the section. If the Court will look into the cases governing those coins that are in no way likely to deceive the public that they are genuine coins—in fact, there is one case in which the Court will recall where on one side it says, “The So and So Company,” some private enterprise, and had the face of the coin on the other side, and what it does is make the possession of coins which are likenesses or similitude as to design, color, or inscription of any other coin an offense. So that so far as any intent is concerned, we have that stipulated in the stipulation of facts in

(Testimony of Bernard Gertz.)

Paragraph 3 in that he had these coins in his possession with intent to sell, give away and otherwise use. That is the only intent pertinent here.

The Court: That is the only intent I am concerned with now. I think you might by direct questioning, if you want to, ask the witness about the design of the respondent coins and that sort of thing. I will listen to that, but not what his intention was to do with them. What directions he gave and that sort of thing isn't really too pertinent, but I will listen to that testimony, because this is not counterfeiting. We are not dealing with counterfeiting at all. Proceed with your questioning, and if Mr. Wichman objects, I will rule on the objections. There is nothing before the Court.

Mr. Wichman. Your Honor, I may be able to shorten [45] it, possibly, by offering to stipulate that Mr. Gertz did not have any intention to defraud the public or pass these coins as genuine. There is no such contention on the part of the government. If that is what the questions are aimed at, we are willing to stipulate that he had no such intention to defraud the government and pass them as coins.

Mr. Tuohy: We will accept the stipulation.

The Court: Very well. The stipulation is approved.

Q. (By Mr. Tuohy): Just one question to Mr. Gertz: Could you tell us what instructions or directions you gave in the minting of these coins, and I show you one marked Prosecution's Exhibit—I

(Testimony of Bernard Gertz.)

mean Plaintiff's Exhibit No. 7. What instructions did you give to change the design on this coin that was sent back to reproduce?

A. We requested that they use a golding metal so it wouldn't be confused, the faces being reversed, and also the word "Souvenir" being put on the bottom; also, there is "Alii of Hawaii," and that is a trade-mark on the back of it.

Mr. Tuohy: No further questions, your Honor.

Mr. Wichman: I have one.

Cross-Examination

By Mr. Wichman:

Q. Referring to Exhibit 7, Mr. Gertz, the coin you sent back to have—let me withdraw that. What company did you send this coin back to that you referred to? [46]

A. Osborne Coinage Company.

Q. Where are they located?

A. Ohio, I believe.

Q. What type of coin did you send back?

A. I sent the original.

Q. You sent back an original Hapa Haneri coin?

A. That is correct.

Q. Similar in all respects to Exhibits 2, 3, 4, 5 and 6?

Mr. Tuohy: Your Honor, I object to that question. The witness hasn't even had the opportunity to see those exhibits, and, also, he is not qualified to answer that type of question.

(Testimony of Bernard Gertz.)

The Court: The objection is overruled.

Mr. Tuohy: Would you like to see the exhibits or——

The Witness: Yes, please, if you don't mind.

Mr. Wichman: Let me withdraw that question and ask it this way:

Q. Showing you Exhibit 2, would you look at the coins in here and tell me whether they are similar, as best you can tell, to the one you sent back to the company, Osborne Company?

A. Yes, I would say they were similar.

Q. Speak louder, please.

A. I would say they were similar.

Q. And you gave the company instructions to duplicate that coin with certain variations, is that correct? [47]

A. Not to duplicate it, if I may put it that way.

Q. To do what with it?

A. To make a pocket piece using similar faces but reversing them as instructed.

Q. Showing you the two genuine Hapa Haneri and Exhibit 7, which is one of the respondent coins; what are the variations or what are the differences between those coins?

A. Just the additional wording on the back of it.

The Court: I can't hear you.

The Witness: Just the additional wording on the back, "Souvenir, Alii of Hawaii." You also have a thickness variation, slightly narrower, thinner coin.

Q. (By Mr. Wichman): That is, Exhibit 7 is

(Testimony of Bernard Gertz.)

slightly narrower, but the wreath is in all respects identical, isn't it?

A. I would say it is very close.

Q. Well, you don't think it is identical?

A. Well, as Mr. Bauer would say, you have got a different fellow cutting the die. It is meant to be very close.

Q. Where do you see any variation?

A. I would say the leaves don't look quite as long on the wreath.

Q. On which exhibit? A. On 7.

Q. 7? [48]

A. Is that it? The leaves don't look as long.

Q. How about the lettering "Hapa Haneri"; do you see any difference there?

A. They are very similar.

Q. And "Aupuni Hawaii"?

A. Might be a little difference in the size of the print used, but very similar.

Q. Referring to the face that says, "Kamehameha III, Ka Moi," do you see any difference there?

A. Well, your color factor, again, is different.

Q. Outside of that, they are very similar?

A. Very similar.

Q. They carry the same wording and same type of portrait and the same date? A. Right.

Mr. Wichman: Could I have a moment, your Honor?

The Court: Yes.

Mr. Wichman: I have no further questions.

Mr. Tuohy: I have no further questions.

The Court: You may step down, Mr. Gertz.

Mr. Tuohy: We have no further witnesses, your Honor.

The Court: Is there any rebuttal?

Mr. Wichman: We have no further evidence, your Honor. But at this time I would like to request permission of the Court to substitute a photograph of Exhibit 2 in evidence, [49] the photograph being the face of one of the coins and the reverse side of one of the coins, and ask permission of the Court to withdraw Exhibit 2, and also permission to withdraw Exhibits 3, 4, 5 and 6, to be returned to the custody of the Bishop Museum. I make that request without submitting photographs in that it is the testimony that each of these is kept separate to show which acquisition is which, and if at any time in the future they need to be recalled, we have sufficient identification in Exhibit 1 to identify exactly which coins we wish to have returned, and I don't like to ask the Bishop Museum to allow us to keep out of their possession items of historical value, such as this, and there is sufficient basis for comparison by the Court in the photograph that we have offered in substitution for Exhibit 2. I don't know whether counsel has any objection.

Mr. Tuohy; No, we have no objection to that.

The Court: Yes, that may be done and the clerk may return the coins from the Bishop Museum to Mrs. Hohu, who is still in court, and the photograph will be received in lieu of those exhibits for the time being.

I would like to have brief arguments from counsel

on this matter. It is a unique situation. Are you free at 10:00 o'clock Monday morning, Mr. Tuohy?

Mr. Tuohy: Yes, your Honor.

The Court: I have a matter that was set down, but [50] it is going to be continued. I think it would be better to have the argument, then. It shouldn't take too long. Are you available at that time, Mr. Wichman?

Mr. Wichman: That is agreeable, your Honor.

(An adjournment was here taken in this [51] matter.)

I, Elbert Cripps, Official Court Reporter, U. S. District Court, Honolulu, T. H., do hereby certify that the foregoing is a true and correct transcript of proceedings in Civil No. 1474, United States of America, Libelant, vs. 3,827 Coins, etc., Respondent, held in the above-named court on September 14, 1956, before the Hon. Jon Wiig. ,

March 8, 1957.

/s/ ELBERT CRIPPS.

[Endorsed]: Filed March 13, 1957.

[Title of District Court and Cause.]

ORAL DECISION

Before: Hon. Jon Wiig, Judge.

September 17, 1956.

I have been unable to find any case directly in point or even analogous to the situation presented by the libel of information and the proof in support of it. At the outset it is necessary to note that this is a libel of information, a civil action, and not a criminal action, although it does include by reference the provisions of Section 489 of Title 18, which is a petty offense carrying a maximum punishment of \$100, whereas most of the counterfeiting sections carry punishments of many thousand dollars and up to fifteen years in prison. And it being a civil action for forfeiture, it still has to be strictly construed as against the respondent. However, I feel that the proof offered on behalf of the libellant is adequate to support the allegations. This is partly covered by stipulation of facts between the counsel for the government and the libellant, leaving for determination the question whether or not the respondent tokens are likenesses of the 1847 hapa haneri coin issued by the Hawaiian government.

I have had an opportunity to examine coins, genuine coins, and I believe them to be genuine on the basis of the evidence and of the testimony of Mr. Bauer. There is no testimony to the contrary. Also the testimony of Mr. Gertz on behalf of the

respondent was to the effect that he had sent a genuine 1847 hapa haneri, or at least he thought it was genuine, to the manufacturer of these discs with directions to make them the same with three exceptions, that the two sides were to be reversed, that is, going up and down on the coin. That direction was carried out. Also, they were to be a little thinner. That direction was carried out. And to imprint on the disc the words "Souvenir, Alii of Hawaii." That was done. I examined the coins or the discs and the genuine coins at the hearing on the motion to dismiss, although my eyes are not too bad, I was unable to pick out those four words without using my glasses and examining the coins very carefully. The one I now have in my hand, having been knocked about during the course of the trial, the color is starting to get in places like some of the genuine coins. How long those words would hold up, I do not know, that is, the words "Souvenir, Alii of [2*] Hawaii," which are extremely small. The photograph of the genuine coin shows a marked likeness, practically complete likeness to the faces of the respondent coins.

I am aware of Mr. Bauer's testimony when he first said this, that any collector would not be fooled by the respondent coins. On cross-examination he said that he didn't think anybody would be fooled. Mr. Bauer was a very precise and discerning witness who was primarily interested in the authenticity of coins. He referred to this respondent coin at the outset as a fake and put it down on the rail there as though he did not even want to handle it.

***Page numbering appearing at top of page of original Reporter's Transcript of Record.**

I do not feel that I am bound by his testimony to the effect that nobody would be fooled by this coin. As a matter of fact, when I asked him some questions, he was even hesitating in admitting that there might be such a person as an unscrupulous coin dealer. I think he is a very ethical man himself and he couldn't even think of anyone who would attempt to palm one of the respondent coins off on a purchaser.

I am satisfied, therefore, that the respondent coins are likenesses or similitudes of the 1847 hapa haneri coins issued by the Hawaiian government.

Then we come to the remaining question, that the 1847 hapa haneri coin was issued as money by the Hawaiian government and whether that government was a foreign country within the meaning of Section 489, and also whether it was issued as [3] money. The proof put forward by the government in that respect, I think, again is satisfactory. The Hawaiian government was a kingdom in 1847 and was a foreign country. Also the proof shows that under the statute of Kamehameha III on April 27, 1846, authority was given to issue coins such as the hapa haneri and that they were issued. In this respect there is absolutely no testimony to the contrary. I am mindful of the argument of counsel for the respondent coins that the Hawaiian government is no longer a foreign country because of the merger. If this were a criminal case, it might present a grave problem, but I don't think it would in view of the general terms of the statute. The coins were issued as money by the Hawaiian government at the

time when it was a foreign country. And I know of no reason why the merger would or could affect that as a question of fact at the time of the issuance of coins. I accepted the stipulation of counsel that Mr. Gertz had no evil intent to defraud, although that is not an issue in this case.

On the basis of the findings of the Court and the stipulations of counsel, I find that the libelant is entitled to forfeiture, and the Court will decree for forfeiture to the United States of the respondent coins and their subsequent disposition pursuant to law.

Mr. Tuohy, whether you and your associate feel there is any possibility of seeking a remission of the forfeiture by [4] application to the Secretary of the Treasury, I don't know. But that is provided for in the statute and if you are to make such an application I will not dispose of it or not order disposal of the respondent coins until you have had an opportunity to make such an application.

March 13, 1957.

/s/ ALBERT GRAIN,
Official Court Reporter.

[Endorsed]: Filed March 13, 1957. [5]

In the United States District Court for the
District of Hawaii

Civil 1474

UNITED STATES OF AMERICA,

Libelant,

vs.

3,827 COINS, Being Likenesses of the 1847 "Hapa
Haneri" Issued by the Hawaiian Government,

Respondent.

ORAL DECISION ON MOTION
TO RECONSIDER

Before Hon. Jon Wiig, Judge.

October 3, 1956.

I appreciate your argument, Mr. Wichman, but I still think that I was wrong when I ruled on the case from the bench before, and I will rescind that ruling and set it aside. I have prepared a draft of an opinion in this case which I am prepared to read into the record, in view of the fact that the memorandum and argument of Mr. Wichman had not convinced me that I was right the first time. My draft reads as follows:

The United States of America as libelant filed a libel of information under the provisions of 18 U.S.C.A., Section 492, against 3,827 Coins, "being likenesses of the 1847 hapa haneri issued by the Hawaiian government," the possession of which it

was alleged violated 18 U.S.C.A., Section 489. The first note under that, I quote the section in toto with the exception of the punishment, Section 489. The libel prayed for forfeiture of the coins and their disposition pursuant to law.

In February, 1956, a special agent of the United States Secret Service field force seized the respondent's coins, claimed them forfeited in violation of the section cited above. The coins were in the possession of Bernard Gertz, who was responsible for their manufacture and who intended to sell them as souvenirs. The Court accepted a stipulation that Mr. Gertz had no intention to defraud or cheat any prospective purchasers, although that is not an issue in the case.

Respondent Coins resemble very closely the hapa haneri copper penny issued by the Kingdom of Hawaii in 1847. They were in fact so intended and so ordered, with certain slight variations which are a different metal, as used in the respondent's coins, and they are slightly thinner than the genuine coins. The facings on the respondent coins are reversed from the hapa haneri, that is, when turning the coins over the reverse side of the respondent coins will appear upside down and on the respondent coins in print so minute as to remain unseen without careful examination are the words "Souvenir, Alii of Hawaii."

The evidence is convincing that the respondent coins are likenesses or similitudes of the 1847 hapa haneri. The evidence showed that the hapa haneri

coin was issued as money by the Kingdom of Hawaii in 1847.

The second act of Kamehameha III entitled, "An Act to Organize the Executive Department of the Hawaiian Islands," enacted April 27, 1846, authorized the issuance of coins such as the hapa haneri. The coins were minted the following year and placed in circulation as genuine money of the kingdom.

Counsel for the respondent coins urged that the coins are not within the proscription of Section 489 because the Kingdom of Hawaii is not now a foreign government or country within the meaning of the statute. Or to put it another way, that Section 489 may only be construed to apply to an "existing" foreign country or government. The Assistant United States Attorney contends on behalf of libelant that the statute is broad in its terms and that any coin "issued as money under the authority of any foreign government" necessarily includes the respondent coins.

The Court takes judicial notice of the following historical facts: On October 8, 1840, the first constitution of the Kingdom of Hawaii was proclaimed by King Kamehameha III. Following the lead of the United States of America, France and Great Britain in November, 1843, united in a joint declaration recognizing the independence of Hawaii. Her status as a sovereign nation continued until the annexation of the Republic of Hawaii to the United States of America by virtue of a joint resolution adopted on July 8, 1898. In April, 1900, Con-

gress enacted the Hawaiian Organic Act which established a territorial form of government in Hawaii, a statute which has remained unchanged since that date.

An early case, *United States against Arjona*, 120 U.S. 479 (1887), points up the need for and validity of laws of the United States which protect the integrity of money, notes or other securities issued by or under the authority of foreign sovereign governments. The rationale of that case, coupled with the definition of "foreign government," found in 18 U.S.C.A., Section 11—and that section is cited as a note after 11—leads to the conclusion that the respondent coins were not issued as money under the authority of a foreign government contrary to the provisions of Section 489. Because of the chain of historical events summarized above the Kingdom of Hawaii cannot possibly be considered as a "foreign government" in the year 1956. It no longer exists.

After long courtship—and there is a note there in which I cite from page 7 of the Revised Laws of Hawaii, 1935, a portion of Act 86 of the Session Laws of Hawaii, 1923—so going back, after a long courtship the engagement was announced in 1898, followed by the wedding in 1900, which forever ended the existence of a proud and noble sovereign nation whose place in the nations of the world had been completely recognized by all other foreign governments up to the date of the final ceremony. I might give you that quote for the record:

"The annexation of Hawaii was first formally

considered between the government of Hawaii and of the United States in 1853-4. At that time President Pierce of the United States instructed Secretary of State Marcy to commission V. L. Gregg to represent the United States in Hawaii to negotiate with Kamehameha III, King of Hawaii, for the annexation of Hawaii to the United States. The treaty was negotiated upon the basis of Hawaii coming into the Union as a state 'enjoying the same degree of sovereignty as other states and admitted as such to all the rights, privileges and immunities of a state, on a perfect equality with other states of the Union.' "

And in that connection see the records of the United States State Department and Downes against Bidwell, 182 U.S. 245 at 305.

The libel of information is dismissed and the respondent coins will be returned to their owner.

March 13, 1957.

/s/ ALBERT GRAIN,
Official Court Reporter.

[Endorsed]: Filed March 13, 1957.

[Title of District Court and Cause.]

DOCKET ENTRIES

1956

Mar. 28—Libel of Information filed. Warrant of Seizure and Monition issued, certifying two copies of Warrant and Libel for service. Marshal's returns to monition filed, served.

Apr. 16—Stipulation for extension of time, filed 5-16-56.

May 15—Motion to Dismiss and Citation of Authorities and Notice of Hearing filed.

May 23—Entering proceedings at hearing on motion to dismiss, arguments by Rodrigues and Tuohy for defense, argument by Wichman, closing argument by Tuohy, Motion to Dismiss denied, allowed 1 week to file pleading, etc.

May 31—Answer filed.

Aug. 8—Stipulation of Facts filed.

Sept. 12—Civil subpoena to produce, etc., issued with copy for service. Marshal's returns to subpoena filed (served).

Sept. 14—Entering proceedings called for trial. Statement by Tuohy and Wichman as to stipulation, etc. Witnesses: Plaintiff—Eugene Chang, Mrs. Clarence Hohu, Hugo E. Bauer. Exhibits: Plaintiff—Nos. 1, 2, 3, 4, 5, 6 and 7 admitted. 11:37 a.m. Plaintiff rests. Witness: Respondent—Bernard Gertz. 11:50 a.m. Respondent

1956

rests. Photo of Plaintiff's Exhibit No. 2 substituted and Exhibits 2, 3, 4, 5 and 6 returned to Mrs. Hohu for Bishop Museum. Court will require arguments. Continued to 10:00 a.m. September 17, 1956, for arguments.

Sept. 17—Entering proceedings at further trial. Opening argument by Wichman. 10:13 a.m. argument by Tuohy. 10:33 a.m. closing argument by Wichman. Oral Ruling by Court. Findings and Stipulation. Libelant entitled to forfeiture of respondents. Decree of Forfeiture to enter and Disposal by Authorities, etc.

Oct. 2—Memorandum in response to motion for reconsideration filed. Form of Judgment and Order of Forfeiture submitted (Plaintiff).

Oct. 3—Entering proceedings at hearing on Court's reconsideration of former ruling. Remarks by Court. Statement by Wichman. Court will rescind ruling and set same aside. Decision read into record. Libel of Information ordered dismissed. Coins to be returned to claimant. Request, Wichman. Coins to be retained until further order of Court. Decision filed. Wiig.

Oct. 16—Form of Judgment and Order Returning Seized Property to Owners submitted. Copy delivered to U. S. Attorney's office.

1956

- Oct. 19—Statement suggesting revision of draft of judgment submitted by claimant filed.
- Nov. 1—Judgment and Order Returning Seized Property to Owner filed. Judgment entered in favor of respondent on November 1, 1956, at 3:30 p.m. Information dismissed. Wiig. Coins will be returned to their owner. Counsel advised by mail as to entry of judgment, etc.
- Dec. 31—Notice of Appeal filed. Counsel for respondent advised by letter.

1957

- Feb. 6—Order extending time for filing record and docketing appeal filed. McLaughlin.
- Feb. 28—Designation of Record on Appeal filed.
- Mar. 6—Order Extending Time for Filing Record and Docketing Appeal filed.
- Mar. 12—Supplemental Designation of Record on Appeal filed.
- Mar. 13—Transcripts of Proceedings May 23, 1956; September 14, 1956; September 17, 1956, and October 3, 1956 filed.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

United States of America,
District of Hawaii—ss.

I, Thomas P. Cummins, Deputy Clerk of the United States District Court for the District of Hawaii, do hereby certify that the foregoing record on appeal in the above-entitled cause, numbered from Page 1 to Page 105, consists of a statement of the names and addresses of the attorneys of record, the various pleadings, exhibits and transcript of proceedings as hereinbelow listed and indicated:

Libel of Information.

Return of Service of Writ.

Public Notice of Attachment.

Warrant of Seizure and Monition.

Stipulation for Extension of Time.

Motion to Dismiss, Citation of Authorities and Notice of Hearing.

Answer.

Stipulation of Facts.

Decision.

Judgment and Order Returning Seized Property to Owner.

Notice of Appeal.

Order Extending Time for Filing Record and Docketing Appeal (February 6, 1957).

Designation of Record on Appeal.

Order Extending Time for Filing Record and Docketing Appeal (March 6, 1957).

Supplemental Designation of Record on Appeal.
Exhibits "1," "2" (Photographic copy), & "7."
Transcript of Proceedings.

I further certify that included in said record on appeal is a copy of the Docket Entries.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said Court this 15th day of March, 1957.

[Seal] /s/ THOS. P. CUMMINS,
Deputy Clerk, United States District Court, District of Hawaii.

[Endorsed]: No. 15485. United States Court of Appeals for the Ninth Circuit. United States of America, Appellant, vs. Barney A. Gertz, Owner of 3,827 Coins, Being Likenesses of the 1847 "Hapa Haneri" Issued by the Hawaiian Government, Appellee. Transcript of Record, Appeal From the United States District Court for the District of Hawaii.

Filed March 19, 1957.

 /s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 15485

UNITED STATES OF AMERICA,

Appellant,

vs.

3,827 COINS, Being Likenesses of the 1847 "Hapa
Haneri" Issued by the Hawaiian Government,
Appellee.

STATEMENT OF POINTS UPON WHICH AP-
PELLANT INTENDS TO RELY ON AP-
PEAL

Appellant herein, pursuant to Rule 75 (d) of the Federal Rules of Civil Procedure, hereby states the points upon which it intends to rely on appeal:

1. The trial court erred in finding respondent coins do not come within the provision of Title 18, United States Code, § 489.

2. The trial court erred in not finding Kingdom of Hawaii was a "foreign government" within the purview of Title 18. United States Code, § 489.

Dated: Honolulu, T. H., this 15th day of March, 1957.

LOUIS B. BLISSARD,

United States Attorney, District of Hawaii, At-
torney for Appellant,

By /s/ CHARLES R. WICHMAN,

Asst. United States Attorney.

Receipt of copy acknowledged.

[Endorsed]: Filed March 20, 1957.

No. 15,485

IN THE

United States Court of Appeals
For the Ninth Circuit

UNITED STATES OF AMERICA,

Appellant,

vs.

BARNEY A. GERTZ, Owner of 3,827 Coins
Being Likenesses of the 1847 "Hapa
Haneri" Issued by the Hawaiian
Government,

Appellee.

On Appeal from the United States District Court
for the District of Hawaii.

APPELLEE'S BRIEF.

JOSEPH HABER, JR.,

PEIRCE COOMBES,

703 Market Street, San Francisco 3, California,

Attorneys for Appellee.

FILED

JUN 18 1957

PAUL P. O'BRIEN, CLERK



Subject Index

	Page
Statement of pleadings and facts disclosing jurisdiction.....	1
Appellant's statement of facts and comments thereon	1
Omissions in appellant's statement of facts	4
Specification of error in the trial court's decision and judgment	6
Summary of argument	6
Argument	7
I. Section 18 U.S.C. Section 489 does not prohibit the making or possession of anything in the likeness or similitude of coins of a nonexistent former foreign country	7
II. However, even did 18 U.S.C. Section 489 prohibit the possession of something in the likeness of a coin of a nonexistent former foreign country or government, notwithstanding, the seized discs would not come within such prohibition, as they are not such likenesses of the Hapa Haneri of the former Kingdom of Hawaii as the section contemplates	14
Conclusion	17

Table of Authorities Cited

Cases	Pages
United States v. Arjona, 120 U.S. 479	8, 11, 12
United States v. Fitzgerald, 91 Fed. 374	14, 16
United States v. Kuhl, 85 Fed. 624	15

Statutes	
18 U.S.C. Chapter 25	10, 12, 13
18 U.S.C. Section 11	9, 13
18 U.S.C. Section 478	10
18 U.S.C. Section 480	10
18 U.S.C. Section 481	10
18 U.S.C. Section 482	10
18 U.S.C. Section 484	10
18 U.S.C. Section 486	10
18 U.S.C. Section 488	10
18 U.S.C. Section 489	4, 6, 7, 9, 11, 12, 13
18 U.S.C. Section 492	12
Revised Statutes of the United States, Section 5430.....	14

No. 15,485

IN THE

**United States Court of Appeals
For the Ninth Circuit**

UNITED STATES OF AMERICA,

Appellant,

vs.

BARNEY A. GERTZ, Owner of 3,827 Coins
Being Likenesses of the 1847 "Hapa
Haneri" Issued by the Hawaiian
Government,

Appellee.

On Appeal from the United States District Court
for the District of Hawaii.

APPELLEE'S BRIEF.

**STATEMENT OF PLEADINGS AND FACTS
DISCLOSING JURISDICTION.**

Appellee accepts the Statement of Pleadings and Facts Disclosing Jurisdiction contained in Appellant's Opening Brief (pages 1-2).

Appellee likewise accepts the general Statement of the Case contained in Appellant's Opening Brief (pages 2-3).

**APPELLANT'S STATEMENT OF FACTS
AND COMMENTS THEREON.**

Appellant's Statement of Facts (pages 5-6) contains statements substantially as follows:

(1) On February 7 and 9, 1956, the Special Agent in Charge, U. S. Secret Field Force, seized 3,827 discs which Appellee had in his possession with intent to sell or otherwise dispose thereof, which statement Appellee admits is correct.

(NOTE: One of such discs was introduced in evidence as Appellant's Exhibit 7.)

(2) The Kingdom of Hawaii was an independent sovereign nation until 1898, when its independent status terminated by annexation to the United States; and in 1900 the Congress of the United States enacted the Hawaiian Organic Act which establishes a Territorial Form of Government for Hawaii, which statements Appellee admits are correct.

(3) The seized discs are likenesses of the Hapa Haneri Coin, a genuine coin issued as money in 1847 under authority of the Kingdom of Hawaii.

Appellee admits as correct the statement that the genuine Hapa Haneri Coin was issued as money in 1847 under authority of the Kingdom of Hawaii, but denies the statement that the seized discs are likenesses of such genuine coin, and contends that they are not likenesses thereof.

(NOTE: The Trial Court both in its decision (R 77) and in its Judgment and Order Returning Seized Property to Owner (R 19) found that "the evidence is convincing that the respondent coins are likenesses or similitudes of the 1847 Hapa Haneri".)

Appellee submits that no evidence was introduced to support such finding, but that on the contrary the only evidence introduced was that of Appellant's own witness, H. E. Bauer, whose testimony established that there is no such likeness or similitude.

This witness was shown several genuine Hapa Haneri Coins minted in 1847 (introduced in evidence as Appellant's Exhibits 1 to 6 inclusive) and one of the seized discs (introduced in evidence as Appellant's Exhibit 7). Said Exhibits 1 to 6 are Hapa Haneri Coins of the 1847 mintage (R 51 to 55). Shown Exhibit 7 his testimony was as follows:

"A. * * * This is a metal. I wouldn't call that a coin. It is different metal, different color, different weight, and, also, the reverse is the same as the obverse of the coin, while on other coins it is just the opposite, you know. And then I can see down here 'Souvenir of Hawaii.' That is (34) not a coin; that is just a fake or metal, whatever it is.

Q. That is not a genuine Hapa Haneri?

A. No, that is not.

Q. Taking Exhibit 4, you say that one of the differences is the back and the face are not reversed, is that correct?

A. Yes. Now, you see, in this coin here, if you turn it over that is upside down—that is up, and here it is upside down.

Q. You are referring to Exhibit 4 as having the face of one side being upside down in relation to the other side, is that correct?

A. The other side. And here they are both alike.

Q. In connection with the one you say is not a Hapa Haneri, the top side is the same as on the bottom side, the same on both sides?

A. That is absolutely right. I don't think that any collector can ever be fooled or any dealer can be fooled by that thing." (R 56.)

"Q. Now, this coin, Mr. Bauer, Plaintiff's No. 7, I show it to you again and ask you in your mind do you think that anybody could be fooled by that coin?

A. I don't think so. Absolutely no. I mean, naturally, I suppose if a stranger came over and is Hell-bent—excuse me—he wants to get a Hapa Haneri, you know—but if he turns it over and sees on there 'Souvenir' . . .

Q. You mean these big letters on the bottom here?

A. Yes, I can see them. I don't need the magnifying glass. I can see that it is there. And I don't think anybody (37) can be fooled by that.

Q. Nobody would be fooled?

A. I don't think so." (R 58-59.)

OMISSIONS IN APPELLANT'S STATEMENT OF FACTS.

The following facts proved by uncontradicted evidence and omitted from Appellant's Statement of Facts are decisive in establishing that possession of the seized discs was not in any sense a violation of the provisions of 18 U. S. C. § 489:

(1) On May 10, 1847, G. P. Judd, Minister of Finance of the Kingdom of Hawaii, issued the following proclamation:

“Pursuant to the provisions of Chapter 4, Part 3, of the Act to Organize the Executive Departments, the undersigned has ‘caused to be minted for circulation a copper coin as described in the first section of (11) that chapter,’ which he has put into circulation as therein prescribed to the extent of an issue of \$1,000.

“Said coin will be accordingly henceforth received *throughout this kingdom and at this department* ‘in payment of government dues, duties and taxes, and in tender or payment of debts contracted by private individuals’ at the value of 100 of said coins to the dollar. G. P. Judd, Minister of Finance.” (R. 34-5; italics supplied.)

(NOTE: The copper coin referred to was the Hapa Haneri.)

(2) In 1956 the Hapa Haneri was not in circulation and would not be accepted in circulation; and since 1900 no coin of the former Kingdom of Hawaii could be passed at all; and such coins are no longer redeemable. (Testimony of Appellant’s Witness, H. E. Bauer, R 59-60.)

The foregoing facts establish that coins of the former Kingdom of Hawaii, including the Hapa Haneri, since 1900 have not been current and have not been in use as money in Hawaii or elsewhere.

In this connection the evidence shows that the Hapa Haneri is a museum piece.

Appellant’s Witness, Mr. Clarence Hohu, testified (R 37-42) that the genuine Hapa Haneris (introduced in evidence as Appellant’s Exhibits 1-6) are kept in

the Bishop Museum, the official repository of the Territory of Hawaii for such items; and Appellant's Expert Witness, H. E. Bauer, testified that the Hapa Haneri "is getting now rather scarce." (R 47.)

SPECIFICATION OF ERROR IN THE TRIAL COURT'S DECISION AND JUDGMENT.

As previously noted the Trial Court in both its Decision and Judgment found that "the respondent coins are likenesses or similitudes of the 1847 Hapa Haneri."

The Court erred in this finding which, although a dictum in view of the Court's decision, nevertheless is specified as error.

SUMMARY OF ARGUMENT.

I. 18 U.S.C. § 489 prohibits the making or possession of likenesses or similitudes of coins of an existing foreign country with which the United States is at peace, but does not prohibit the making or possession of anything in the likeness or similitude of coins of a nonexistent former foreign country.

II. There is no evidence to support the dictum of the District Court that the discs possessed by the Appellee are likenesses or similitudes within the meaning of 18 U.S.C. § 489 of the Hapa Haneri coin of the nonexistent former Kingdom of Hawaii which was minted in 1847 and went out of circulation as money in 1898.

ARGUMENT.

I. SECTION 18 U.S.C. § 489 DOES NOT PROHIBIT THE MAKING OR POSSESSION OF ANYTHING IN THE LIKENESS OR SIMILITUDE OF COINS OF A NONEXISTING FORMER FOREIGN COUNTRY.

Appellant's fundamental contention stated without qualification in its Summary of Argument is:

“The plain meaning of 18 U.S.C. § 489 prohibits the making of likenesses of any coins of a foreign country *whether such country is currently in existence or not*” (page 6; italics supplied).

Under such construction, the Section would prohibit the making or possession (and here only possession is involved) of discs in the likeness or similitude of the stater of Ancient Carthage, the denarius of Ancient Rome, the shekel of the Ancient Kingdom of Judea and the coins of every other country that formerly existed, irrespective of the time when its existence ceased.

In its decision that Section 489 does not prohibit the possession of a devise or token in likeness or similitude of a coin of a nonexistent country such as the former Kingdom of Hawaii, the District Court states:

“An early case, *United States v. Arjona*, 120 U.S. 479 (1887), points up the need for and validity of laws of the United States which protect the integrity of money, notes or other securities issued by or under the authority of foreign sovereign governments. The rationale of that case, coupled with the definition of ‘foreign government’ found in 18 USCA § 11, led to the conclusion that respondent coins were not issued as money under the authority of a foreign government contrary to the provisions of Section 489.” (R 17.).

Appellant argues that the "*Arjona* Case, if relevant at all, cannot be controlling, when Congress enacted the predecessor of 489 a number of years after the *Arjona* Case was decided by the Supreme Court of the United States." (page 10.)

Such case is both relevant and controlling, because every statute, enacted subsequent to the decision, which prohibits the making or possession of coins in likeness or similitude of foreign coins must be construed and interpreted in view of the constitutional right of Congress to enact such legislation, as stated in the decision.

The Defendant *Arjona* was indicted for violating an act of Congress making felonious the counterfeiting in the United States of a note issued by a bank of a foreign country intended by law or usage of the foreign country to circulate as money.

Defendant demurred to the indictment on the ground that such counterfeiting cannot constitutionally be made an offense against the law of nations.

The Judges of the lower Court, being in disagreement, certified to the Supreme Court of the United States the question:

"Whether the counterfeiting within the United States of the notes of a foreign bank or corporation can be constitutionally made by Congress an offense against the law of nations" (120 U.S. 479: Column 1).

Chief Justice Waite in an exhaustive decision stated:

"The law of nations requires every national government to use 'due diligence' to prevent a wrong

being done within its own dominion to another Nation *with which it is at peace*, or to the people thereof; and because of this the obligation of one Nation to punish those who, within its own jurisdiction, counterfeit the money of another Nation has long been recognized.” (Italics supplied.)

No statement could be more definite; and all subsequently enacted statutes such as 18 U.S.C. § 489, must be interpreted, construed and limited in application to conform thereto.

18 U.S.C. § 11 to which the District Court refers in the portion of its decision above quoted provides:

“The term ‘foreign government,’ as used in this title, includes any government, faction or body of insurgents within a country *with which the United States is at peace*, irrespective of recognition by the United States.” (Italics supplied.)

The Section here involved, 18 U.S.C. § 489, provides with reference to foreign coins as follows:

“Whoever, within the United States makes . . . or possesses with intent to sell, give away, or in any other manner use the same, . . . any token, devise, print or impression, or any other thing whatsoever, in the likeness or similitude as to design, color or the inscription thereon of any of the coins . . . of any foreign country issued as money, . . . under the authority of any foreign government, shall be fined. . . .”

Appellant argues (page 10):

“But it should be noted that both the terms ‘foreign country’ and ‘foreign government’ are used in Section 489. The term ‘foreign country’

controls the issue here. The terms are obviously not synonymous. The definition of 'foreign government' will not restrict the term 'foreign country' or control the issue here."

On the contrary, in those sections of Chapter 25 of 18 U.S.C. (captioned "Counterfeiting and Forgery") which deal with foreign coinage, the terms "foreign country" and "foreign government" are used interchangeably and synonymously.

To Particularize:

In Section 478, the subject matter of which is counterfeiting securities, the term used is "foreign government";

In Section 480, the subject matter of which is possession of a foreign security, the term used is "foreign country";

In Section 481, the subject matter of which is having plates from which money may be printed, the term used is "foreign government";

In Section 482, the subject matter of which is counterfeiting bank notes, the term used is "foreign country";

In Section 484, the subject matter of which is piecing together parts of currency, the term is "foreign government";

In Section 486, the subject matter of which is uttering coins, the term used is "foreign countries";

In Section 488, the subject matter of which is the making of molds, the term used is "foreign government."

The Section here involved, 489, uses both the terms "foreign country" and "foreign government," but those terms, as generally in the other sections last referred to, are used interchangeably; and the section would be exactly the same in meaning did it read:

"Whoever within the United States makes . . . or possesses . . . any token, devise, print or impression, or any other thing whatsoever, in the likeness or similitude as to design, color or inscription thereof of any of the coins . . . of any *foreign government*" (instead of *foreign country*) "issued as money, . . . under the authority of *such*" (instead of any) "foreign government, shall be fined. . . ."

Futhermore, the Section would be exactly the same did it use the word *Nation* (as did Chief Justice Waite in the *Arjano* Case) instead of either the word *country* or *government*.

Appellant further contends (page 12) that limiting the application of Section 489 to foreign countries with which the United States is at peace would lead to the "absurd result" that there would be excluded from its application countries between whom and the United States a state of war exists.

In the *Arjano* Case the United States Supreme Court did not regard such result as "absurd," for in its decision it provided that the Congress may constitutionally enact legislation which prohibits the counterfeiting of money of "another country with which it" (the United States) "is at peace."

Furthermore, that the terms *foreign government* and *foreign country* are synonymous and inter-

changeable in the Sections of 18 U.S.C. Chapter 25 is conclusively established by the provisions of 18 U.S. C. § 492, which furnishes the sole authority for seizure and forfeiture of articles the making or possession of which is prohibited by the twenty-one preceding Sections of said Chapter.

Said Section 492 employs the term *foreign government*: nowhere therein does the term *foreign country* appear.

Accordingly, were not *foreign government* synonymous and interchangeable with *foreign country* throughout said Chapter 25, then said Section 492 would contain no authority whatsoever for seizure and forfeiture of articles the making or possession of which is prohibited by those Sections of Chapter 25 in which the term *foreign country* and not *foreign government* is employed.

Said Section 492 would have been exactly the same had it used the term *foreign country*, or the term *foreign Nation*, as did the United States Supreme Court in the *Arjano* case.

Appellant's Brief (Page 9) notes that Section 489 "is not an absolute prohibition" and that permission for the possession of likenesses of foreign coins may be obtained from the Secretary of the Treasury.

Such permission is required for possession of likenesses of foreign coins that come within the scope of the Section, to-wit: coins of an existing foreign Nation with which the United States is at peace; but surely it cannot be contended that such provision has

any application to permission for the possession of likenesses of coins of a nonexistent former Nation, which, as submitted, do not come within the Section's scope.

Finally, in this connection it should be noted that 18 U.S.C. § 11 defines a foreign government as that of "a country with which the United States *is* at peace." (Italics supplied.)

The United States *was* at peace with the Kingdom of Hawaii up to 1898, but by no stretch of the imagination can it be considered a country with which the United States *is* at peace when its very existence terminated fifty-eight (58) years ago.

It is submitted that the District Court was correct in deciding that the rationale of the *Arjona* Case coupled with the definition of "foreign government" found in 18 U.S.C. § 11 leads to the conclusion that possession by the Appellee of the discs in question was not within the prohibition of said Section.

While it is believed the foregoing considerations are decisive in support of Appellee's position, nevertheless it may not be amiss to consider the general intent of the Congress in enacting Chapter 25 of Title 18 U.S.C. captioned "Counterfeiting and Forgery."

Obviously, it was to prohibit acts which would or could defraud or deceive the government and/or the public.

Such deception could result in the possession of coins in the likeness or similitude of coins of an existing foreign country, and accordingly Section 489

prohibits such possession, but could the Government or the public possibly be deceived by the possession of something in the likeness or similitude of the coins of a country which long since has ceased to exist?

It is submitted that such question answers itself in the negative, and that such answer applies forcibly to the possession in 1956 of discs in the likeness of a coin issued in 1847 by the former Kingdom of Hawaii, whose very existence as a country permanently ceased in 1898.

II. HOWEVER, EVEN DID 18 U.S.C. § 489 PROHIBIT THE POSSESSION OF SOMETHING IN THE LIKENESS OF A COIN OF A NONEXISTING FORMER FOREIGN COUNTRY OR GOVERNMENT, NOTWITHSTANDING, THE SEIZED DISCS WOULD NOT COME WITHIN SUCH PROHIBITION, AS THEY ARE NOT SUCH LIKENESSES OF THE HAPA HANERI OF THE FORMER KINGDOM OF HAWAII AS THE SECTION CONTEMPLATES.

Section 5430 of Revised Statutes of the United States prohibited the possession of "any obligation or other security engraved and printed after the similitude of any obligation or other security issued under the authority of the United States, with intent to sell or otherwise use the same . . ."

United States v. Fitzgerald, 91 Fed. 374: Defendant Fitzgerald was indicted for the possession of a paper alleged to be in the likeness of an obligation of the United States.

The Court instructed the jury that to find the defendant guilty it must find that the paper is "in the similitude of some obligation of the United States," and further:

“ * * * the similitude must be in such a degree as to furnish a resemblance so near to the government obligations or securities that *it could be used to deceive a person of ordinary intelligence, who is acting with ordinary care, in a business transaction.* The resemblance is sufficient for the purpose if you believe that it would probably deceive a person taken unawares, in dealing with a person whom he believed was acting honestly. If it could be so used against a person of that kind, when unsuspecting or unwary, as to deceive him, and be effectual to commit a fraud, then it would be in the similitude as intended by this statute.” (Pages 375-6; italics supplied.)

United States v. Kuhl, 85 Fed. 624: Defendant Kuhl was indicted under the same statute. The syllabus 2 states the conclusion of the Court as follows:

“The ‘similitude’ contemplated in Rev. St. § 5430, which makes criminal the having in one’s possession, with intent to sell or use the same, ‘any obligation or security engraved and printed after the similitude of any obligation or other security issued under the authority of the United States,’ is such a likeness or resemblance as to be calculated to deceive an honest, sensible, and unsuspecting man of ordinary care and observation, when dealing with a supposed honest man.”

The same rules must apply in determining whether the seized discs are in the likeness or similitude of the Hapa Haneri.

Concerning this, the only evidence before the District Court was that of Appellant’s own witness, H. E. Bauer.

His uncontradicted evidence, hereinbefore set forth under the caption "Appellant's Statement of Facts and Comments Thereon" was in substance as follows:

(a) The seized disc (Appellant's Exhibit 7) differs from the Hapa Haneri in its metal, its color which is golden instead of copper, and its weight;

(b) In the Hapa Haneri its back face is upside down with reference to its front face, whereas in the seized disc there is no such difference between the front and back faces;

(c) The seized disc is stamped "Souvenir"; and

(d) No one could be fooled into believing that the seized disc is a genuine Hapa Haneri.

These differences were requested by the Appellee in ordering the making of the discs, as shown by his testimony:

"We requested that they use a golding metal so it wouldn't be confused, the faces being reversed, and also the word 'Souvenir' being put on the bottom; also, there is 'Alii of Hawaii,' and that is a trade-mark on the back of it." (R 67.)

To support the Court's finding, which is but dictum, "that the respondent coins are likenesses or similitudes of the 1847 'Hapa Haneri,'" the likeness or similitude must be such as "to deceive a person of ordinary intelligence, who is acting with ordinary care, in a business transaction," as stated in *United States v. Fitzgerald* (supra).

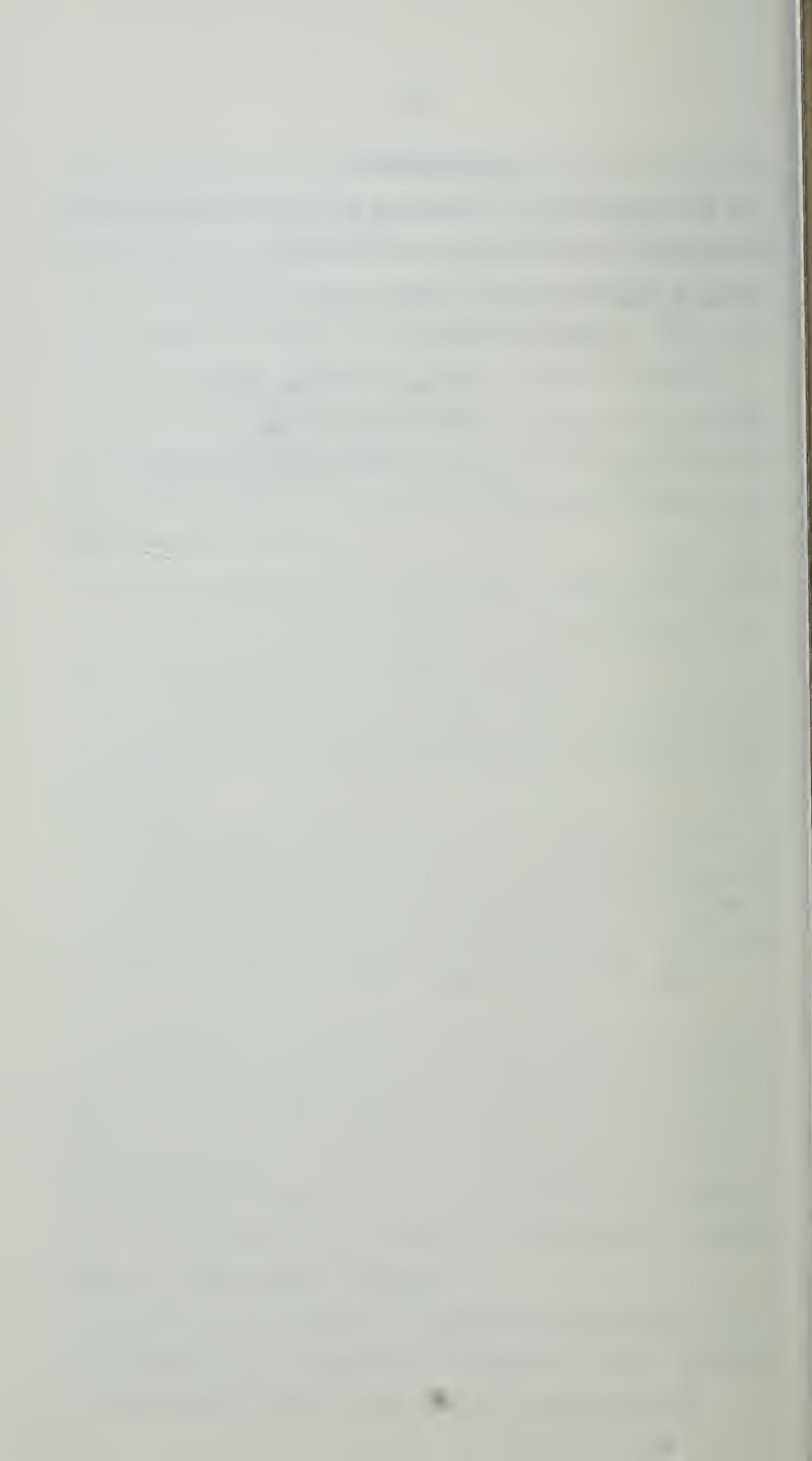
There is no evidence to support such finding: on the contrary the evidence of Appellant's own witness is to the effect that no one could be so deceived.

CONCLUSION.

It is respectfully submitted that the Judgment of the District Court should be affirmed.

Dated, San Francisco, California,
June 17, 1957.

JOSEPH HABER, JR.,
PEIRCE COOMBES,
Attorneys for Appellee.



No. 15,485

IN THE

United States Court of Appeals
For the Ninth Circuit

UNITED STATES OF AMERICA,
Appellant,

vs.

BARNEY A. GERTZ, Owner of 3,827 Coins
Being Likenesses of the 1847 "Hapa
Haneri" Issued by the Hawaiian
Government,
Appellee.

On Appeal from the United States District Court
for the District of Hawaii in Civil No. 1474.

APPELLANT'S REPLY BRIEF.

LOUIS B. BLISSARD,
United States Attorney,
District of Hawaii,
Honolulu, Hawaii,
Attorney for Appellant.

FILED

JUL 15 1957

PAUL P. O'BRIEN, CLERK



Subject Index

	Page
Opening statement	1
Part I	1
Part II	2
Conclusion	4

Table of Authorities Cited

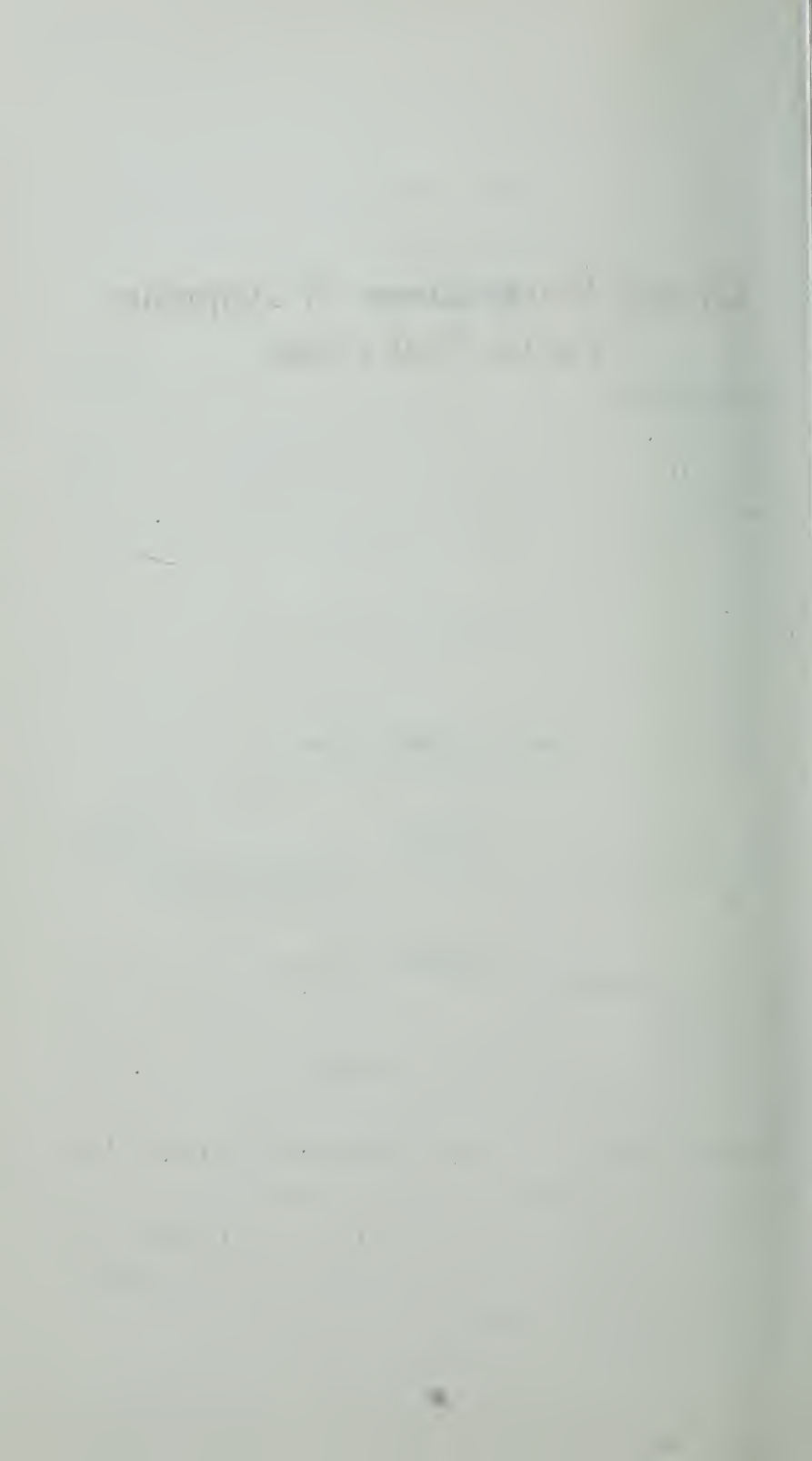
Cases

Page

Midland Valley R. Co. v. Fulgham, 8 Cir., 181 Fed. 91, 95-96	2
--	---

Statutes

18 U.S.C., Chapter 25	3
18 U.S.C., § 11	3
18 U.S.C., § 489	2
48 U.S.C., §§ 513-514	3
48 U.S.C., § 516	3



No. 15,485

IN THE

**United States Court of Appeals
For the Ninth Circuit**

UNITED STATES OF AMERICA,

Appellant,

VS.

BARNEY A. GERTZ, Owner of 3,827 Coins
Being Likenesses of the 1847 "Hapa
Haneri" Issued by the Hawaiian
Government,

Appellee.

On Appeal from the United States District Court
for the District of Hawaii in Civil No. 1474.

APPELLANT'S REPLY BRIEF.

OPENING STATEMENT.

I.

Certain portions of Appellee's Brief should be stricken as immaterial and impertinent:

1. The SPECIFICATION OF ERROR IN THE TRIAL COURT'S DECISION AND JUDGMENT, appearing on page 6;

2. Part II of his argument, appearing on pages 14-16; and

3. The summary thereof, appearing on page 6.

Cross-errors are not assignable in the Federal Court, and a party who has secured all the relief he seeks, cannot, by assigning or arguing cross-errors, confer jurisdiction on an appellate court to consider or determine alleged erroneous rulings not otherwise presented. *Midland Valley R. Co. v. Fulgham*, 8 Cir., 181 Fed. 91, 95-96. This rule seems so well established that Appellant has refrained from filing a separate motion to strike the above mentioned portions of Appellee's Brief and will not undertake to answer such portions herein.

II.

In Part I of his argument, Appellee states that under Appellant's construction of 18 U.S.C., § 489, Congress has prohibited the making or possession of disks in the likeness or similitude of the coins of ancient countries, irrespective of the time such countries ceased to exist. With the qualification that the aforementioned possession must be coupled with the requisite intent set forth in the statute, we say Appellee is absolutely right—*except that the making, importing or possession of such disks or coins may be authorized by the Secretary of the Treasury or other proper officer of the United States.*

This is not an unreasonable situation. The Secretary of the Treasury may well authorize the making of disks or coins in the likeness or similitude of the stater of ancient Carthage, the denarius of ancient Rome, or the shekel of the ancient Kingdom of Judea, but he would be less likely to authorize the making of coins in the likeness or similitude of the coins of the Kingdom of Hawaii, *when those coins are still legal tender and are redeemable in American currency.* 48 U.S.C., §§ 513-514.

Hawaiian coins are redeemable today in coin of the United States. Hawaiian silver certificates were redeemable up until January 1, 1905. 48 U.S.C., § 516 (historical note). Surely, Congress intended that these coins and certificates, issued by a non-existing former foreign government, should be protected from counterfeiting. However, if "foreign government," as used in Chapter 25 of Title 18, means what the court below said it means, then there was and is nothing in our laws prohibiting the counterfeiting of these coins and certificates. Such a result would be unthinkable—a further cogent reason to conclude that the word "include," as used in § 11 of Title 18, U.S.C., is a word of enlargement, and thus the term "foreign government," as defined in said § 11, is not a limitation upon Chapter 25 of Title 18.

CONCLUSION.

The judgment of the District Court should be reversed.

Dated, Honolulu, T.H.,
July 1, 1957.

LOUIS B. BLISSARD,
United States Attorney,
District of Hawaii,
Attorney for Appellant.

No. 15492

**United States
Court of Appeals**
For the Ninth Circuit

FRANCES CARDINALE, ANN F. CARDI-
NALE, HORACE A. CARDINALE and
FRANK J. CARDINALE, Minors, by
FRANCES CARDINALE, Their Guardian,
Ad Litem,

Appellants,

vs.

UNION OIL COMPANY, a Corporation,

Appellee.

Transcript of Record

**Appeal from the United States District Court for the
Northern District of California,
Southern Division.**

JUN 17 1957



No. 15492

United States
Court of Appeals
For the Ninth Circuit

FRANCES CARDINALE, ANN F. CARDINALE, HORACE A. CARDINALE and FRANK J. CARDINALE, Minors, by FRANCES CARDINALE, Their Guardian, Ad Litem,

Appellants,

vs.

UNION OIL COMPANY, a Corporation,

Appellee.

Transcript of Record

Appeal from the United States District Court for the
Northern District of California,
Southern Division.

1000

1000

1000

1000

1000

1000

1000

1000

1000

1000

1000

1000

1000

1000

1000

1000

1000

1000

1000

1000

1000

1000

INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

	PAGE
Answer	9
Attorneys, Names and Addresses of	1
Certificate of Clerk to Record on Appeal	57
Findings of Fact and Conclusions of Law	17
Judgment on Findings of Court	23
Libel	3
Memorandum Opinion	10
Minutes of March 14, 1956	32
Minutes of December 18, 1956	32
Notice of Appeal	33
Objections and Amendments to Proposed Findings of Fact and Conclusions of Law	24
Order Extending Time to File Objections, Filed January 19, 1956	30
Order Extending Time to File Objections, Filed February 14, 1956	31
Order Overruling Objections and Amendments	32

INDEX	PAGE
Petition for Appointment of Guardian Ad Litem, Etc.	6
Order Re	8
Statement of Points on Appeal	34
Transcript of Proceedings March 14, 1956, Set- tlement of Findings	35
Transcript of Proceedings December 18, 1956, Motion for Order Nunc Pro Tunc	54

NAMES AND ADDRESSES OF ATTORNEYS

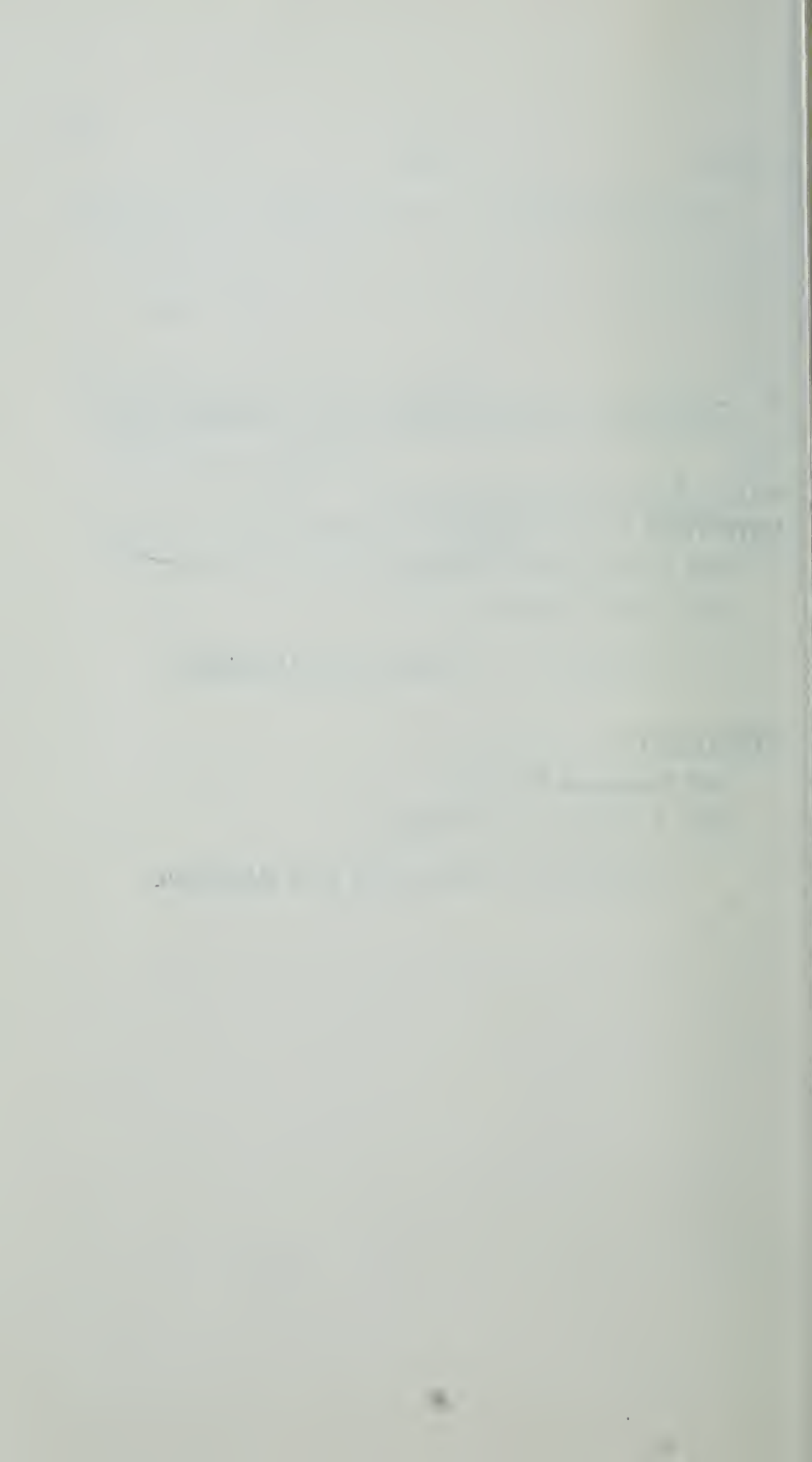
MORGAN & BEAUZAY and
MORTON L. SILVERS,

906 Commercial Building,
San Jose, California,

Proctors for Libelant and Appellant.

FREDERIC C. NAVE,
350 Sansome Street,
San Francisco, California,

Proctor for Respondent and Appellee.



In the District Court of the United States, Northern District of California, Southern Division

No. 27098 in Admiralty

FRANCES CARDINALE, ANN F. CARDINALE, HORACE A. CARDINALE, and FRANK J. CARDINALE, Minors, by FRANCES CARDINALE, Their Guardian, Ad Litem,

Libelants,

vs.

UNION OIL COMPANY, FIRST DOE, SECOND DOE, THIRD DOE, BLACK & WHITE COMPANY, a Copartnership; RED & WHITE COMPANY, a Corporation,

Respondents.

LIBEL IN PERSONAM

I.

That libelant, Frances Cardinale, was appointed by the above-entitled Court as, and now is, the guardian, ad litem, of libelants, Ann F. Cardinale, age thirteen (13); Horace A. Cardinale, age eleven (11), and Frank J. Cardinale, age three (3), minors.

II.

That libelant, Frances Cardinale, is the mother of said minors, and that said minors are the children of Frances Cardinale and Frank Cardinale; that said Frank Cardinale died on or about Sep-

tember 28, 1954; that libelants are the only heirs at law of said Frank Cardinale.

III.

That the death of Frank Cardinale occurred aboard the Santa Lucia, a vessel on navigable waters, and this Court has jurisdiction of this cause pursuant to the provisions of 46 U.S.C. 740.

IV.

That this action is brought pursuant to the terms and provisions of Section 377 of the Code of Civil Procedure of the State of California.

V.

That respondent Union Oil Company is now, and at all times herein mentioned was, a corporation duly organized and existing under and by virtue of the laws of the State of California.

VI.

That at all times herein mentioned respondents First Doe and Second Doe were the agents and employees of respondent Union Oil Company and were engaged in the course and scope of said agency and employment.

VII.

That the true names of respondents First Doe, Second Doe, Third Doe, Black & White Company, a copartnership, and Red & White Company, a corporation, are unknown to libelants, who therefore sue said respondents by said fictitious names, and pray leave of Court to amend this libel to show the

true names and capacities of said respondents when these have been ascertained.

VIII.

That on or about September 28, 1954, at Avila, California, respondents negligently maintained, inspected, operated and controlled the gas fueling equipment and dock there located, said dock, according to libelants' information and belief, being known as the Union Oil Company dock at Avila, California; negligently fueled, and supervised the fueling of the Santa Lucia, of which vessel said Frank Cardinale was part owner and engineer, while said vessel was moored to said dock; negligently failed to observe, watch and control the quantity of gasoline pumped aboard said vessel from the Union Oil Company gasoline pump located on said dock; negligently and carelessly permitted more gasoline to be pumped aboard said vessel than was ordered or the vessel's gasoline tank would hold; negligently permitted the Santa Lucia to dock and be moored in an area where a dangerous accumulation of vapors and gaseous fuel existed; and negligently and carelessly failed to warn the crew or master of the Santa Lucia of said accumulation.

IX.

That as a direct and proximate result of the afore-said negligence, an explosion occurred aboard the Santa Lucia, proximately causing the death of said Frank Cardinale; that by reason of the death of

Frank Cardinale libelants have been generally damaged in the sum of \$150,000.00.

Wherefore, libelants pray that citations in due form of law may issue against the respondents herein, citing them to appear and answer in the premises; that this Court decree the payment by said respondents to the libelants of the sum of \$150,000.00, together with interests and costs; and that libelants may have such other and further relief as may be just.

/s/ MORTON L. SILVERS,
MORGAN & BEAUZAY,
Proctors for Libelants.

Duly verified.

[Endorsed]: Filed April 4, 1955.

[Title of District Court and Cause.]

PETITION FOR APPOINTMENT OF GUARDIAN, AD LITEM, AND EMPLOYMENT OF ATTORNEYS AND PROCTORS AND ORDER APPOINTING GUARDIAN, AD LITEM

Petitioner Alleges:

I.

Petitioner is a resident of the City of Pacific Grove, Monterey County, California, and is the mother of Ann F. Cardinale, aged thirteen (13);

Horace A. Cardinale, aged eleven (11), and Frank J. Cardinale, aged three (3), who reside with petitioner at Pacific Grove, California; that said minors have no general or testamentary guardian.

II.

Said minors have a cause of action against Union Oil Company and the respondents named herein by their fictitious names, as the heirs of Frank Cardinale, their father, who died on September 28, 1954, due to the negligence and carelessness of respondents; that said minors' best interest requires that they bring an action in this court for the wrongful death of their father.

III.

Petitioner is a competent and responsible person qualified to act as the guardian, ad litem, of said minors in said action; that no previous application for an appointment of a guardian, ad litem, in this action has been made.

IV.

That said minors and petitioners are without funds to prosecute the within action and petitioner prays for authority to employ Morton L. Silvers and Morgan & Beauzay as her attorneys and proctors in admiralty on the basis of the following contingent fee schedule, to wit: One-third if settled without trial, four-tenths if tried, and one-half if appealed.

Wherefore, petitioner prays she be appointed guardian, ad litem, for said minors and she be

authorized to employ said attorneys and proctors on the aforesaid contingent fee basis to prosecute such action.

/s/ FRANCES CARDINALE,
Petitioner.

/s/ MORTON L. SILVERS,

MORGAN & BEAUZAY,

By /s/ ROBERT MORGAN,
Attorneys and Proctors for
Petitioner.

Duly verified.

Order

Frances Cardinale is hereby appointed guardian, ad litem, of Ann F. Cardinale, Horace A. Cardinale and Frank J. Cardinale, and is authorized to employ Morton L. Silvers and Morgan & Beauzay as attorneys and proctors on the terms set forth in her Petition for Appointment of Guardian, Ad Litem, and Employment of Attorneys.

Dated: April 4, 1955.

/s/ O. D. HAMLIN,
Judge of the District Court.

[Endorsed]: Filed April 4, 1955.

[Title of District Court and Cause.]

ANSWER TO LIBEL IN PERSONAM

Comes now the respondent, Union Oil Company, and answering Libelants' Libel in Personam on file herein, admits, denies and alleges as follows:

I.

Answering Paragraphs I, II, III and VI, said respondent alleges that it has no information or belief upon the subject sufficient to enable it to answer the allegations therein contained and placing its denial on that ground, denies each and every, all and singular, the allegations therein contained and each and every part thereof.

II.

Answering Paragraphs VIII and IX, denies each and every, all and singular, the allegations therein contained and each and every part thereof.

Denies that Libelants, Frances Cardinale, Ann F. Cardinale, Horace A. Cardinale and Frank J. Cardinale, have been damaged in the sum of \$150,000.00 or any other sum or sums whatsoever or at all.

Further Answering Said Libel in Personam, and as and for a separate and distinct defense thereto and plea of contributory negligence, said respondent alleges that Libelant, Frank Cardinale, was negligent and careless in and about the matters set forth in said Libel in Personam in the following manner, to wit: That at said time and place Libelant, Frank Cardinale, failed to use due or any care or caution

for the protection of his own safety; that said acts of carelessness and negligence on his part proximately caused or contributed to the damage sustained or injury sustained.

Wherefore, said respondent prays that libelants take nothing by their action and that said respondent be hence dismissed with its costs herein incurred.

BOYD & TAYLOR,

/s/ FREDERIC G. NAVE,
Proctors for Respondent,
Union Oil Company.

Duly verified.

Affidavit of Service by Mail attached.

[Endorsed]: Filed May 14, 1955.

[Title of District Court and Cause.]

MEMORANDUM OPINION

Roche, Chief Judge:

This case involves the death of Frank Cardinale, occurring on navigable waters aboard the vessel Santa Lucia. This court has jurisdiction of this cause pursuant to 40 U.S.C., § 740.

The facts of this case are as follows: On September 28, 1954, shortly before 5:30 p.m. the fishing boat, Santa Lucia, came into the Union Oil dock at Avila, California, in order to take aboard gasoline. As the Santa Lucia came into the Union Oil dock,

the tanker Lompoc, which was standing at least two hundred to two hundred fifty feet away, was finishing the loading of almost one and one-half million gallons of Orcutt enriched crude, which it had been loading for some six and one-half hours before the appearance of the Santa Lucia. This fuel, Orcutt, is highly volatile, containing approximately seventeen per cent natural gasoline.

The dock attendant passed the gasoline hose down to the boat, Santa Lucia, which was standing fifteen feet below the dock, and opened the valves at the meter allowing gasoline to flow into the gasoline lines. As decedent took the hose the dock attendant asked him approximately how much gasoline he would need. Decedent replied about thirty (30) gallons. Decedent then placed the nozzle (spring loaded) passed to him, of the flow of gasoline into the tank. which opening was flush with the deck, and commenced the fueling operation. The gasoline tank, itself, was located under the deck, held there by hangars, and could only be seen by someone below decks. Decedent had complete control, once the hose was passed to him, of the flow of gasoline into the tank. As there was a shut off at the end of the hose, decedent could have stopped the flow of gasoline at any time. The meter which measured the flow of gasoline stood approximately twenty-six inches high above the floor of the dock, and was located six feet back and from the edge of the dock, where it could not be seen by decedent in the boat, located as it was, below the dock. It is uncontroverted that a

meter reading taken some time later indicated that fifty-eight gallons of gasoline had been delivered out of the storage tanks on the dock. The fishing vessel's gasoline tank had a maximum capacity of about forty gallons. It was also uncontroverted that no gasoline spilled on the deck of the Santa Lucia, showing that decedent had not carelessly allowed the tank to overfill. About one and one-half hours before the Santa Lucia commenced fueling, a complete inspection of the boat for insurance purposes had been made by Captain Hansen, an experienced marine surveyor. It was Captain Hansen's opinion at the time that the fishing boat was seaworthy and that its gas tank was in sound condition. Some time after fueling commenced, as a result of gasoline vapors which had collected in the hold of the fishing boat, an explosion and fire ensued causing the death of Frank Cardinale.

Libelants have set forth several theories in their libel by which they place responsibility for the explosion and fire on respondents. Said libel reads in part as follows:

“That on or about September 28, 1954 * * * respondents negligently maintained, inspected, operated and controlled the gas fueling equipment and dock * * * known as the Union Oil Company dock at Avila, California; negligently fueled, and supervised the fueling of the Santa Lucia, of which vessel Frank Cardinale was part owner and engineer, while said vessel was moored to said dock; negligently failed to observe, watch and control the quan-

tity of gasoline pumped aboard said vessel from the Union Oil Company gasoline pump located on said dock; negligently and carelessly permitted more gasoline to be pumped aboard said vessel than was ordered or the vessel's gasoline tank would hold; negligently permitted the Santa Lucia to dock and be moored in an area where a dangerous accumulation of vapors and gasoline fuel existed; and negligently and carelessly failed to warn the crew or master of the Santa Lucia of said accumulation."

The libelants have the burden of proving negligence on the part of the respondents. It has been submitted by both counsel for libelants and respondents that one of two things occurred causing this catastrophe. Either the equipment on the dock was defective, or the gasoline tank on the fishing vessel was defective; and that this defect resulted in the liberation of gasoline which caused the fatal sequence of events. There is no direct evidence supporting either of these theories. No witness testified to having observed gasoline spilling on the dock, nor did any witness testify to having observed the fishing boat's gas tank leaking at the time gasoline was being taken aboard.

If libelants' theory is the correct one, that the defect existed on the dock, then it would require the court to believe that twenty to thirty gallons of gasoline spilled out on the Union Oil dock in the vicinity of the meter, and that although a number of people were in the area not one detected the presence of gasoline. In view of the physical facts this seems highly improbable. It would mean that the

dock attendant, the three men who were aboard the tug Avila some forty (40) feet away or less, and the men who were on the fishing boat, all failed to detect the large quantity of fuel that would have spilled out on the dock.

Following the explosion and fire an inspection was made of the fueling equipment on the dock and nothing was found wrong either in the gasoline storage tank or the lines that run from the tank to the meter, which meter is six feet away from the edge of the dock. The gasoline storage tank itself was not ruptured or blown up, and the gasoline that was in the storage tank was salvaged and used later. All of the pipes, all of the connections running from the gasoline storage tank to the meter were determined to be sound. Therefore, if approximately thirty gallons of gasoline was dumped on the dock, it had to be spilled past the meter or in the area of the meter some six feet from the edge of the wharf. As stated previously, no witness testified either to having seen or smelled the spillage.

The photographs placed in evidence reveal that there had to be a tremendous underwater explosion aboard the fishing boat. In order to have an explosion of the type pictured, there had to be and was of necessity a quantity of gasoline vapor within the boat itself. Under the theory of libelants' case, those vapors were sucked into the boat from the Lompoc, which was fueling in the neighborhood of the Santa Lucia, and/or from the gasoline allegedly spilled

out on the dock. The witnesses who were experts in their fields, and the literature on the subject of the toxic effect of fumes, manifest an absolute impossibility that fumes from the Lompoc could have had a causal connection contributing to the explosion. It is significant that of the witnesses who were in the immediate area, not one, either from the Lompoc, or the Santa Lucia, or the tug Avila, testified as to having experienced any personal discomfiture whatsoever, or of noticing any unusual concentration of fumes or smell of petroleum products on the day in question. It is the court's conclusion that the evidence failed to show that the Lompoc's fueling had any causal relationship with the explosion and fire.

Testimony was given in this case by Captain Hansen, a Coast Guard licensing examiner, who had checked over the boat about 90 minutes before the fire and explosion. The broker who wrote insurance for the fishing boat was aboard the fishing boat with this witness. The captain testified that on a prior inspection, about a year before this accident, he found the fishing boat to be in poor housekeeping condition, wiring in poor condition, and generally filthy and dirty. As to his inspection of the gasoline tank on the day of the explosion and fire, the witness said that his test consisted of running his hand over the tank and feeling the valves. He stated that he did not know of what material the tank was made of, nor its capacity, and that he did not pressure test the tank. On the basis of this inspection the Captain testified that in his opinion the tank was

sound. The court does not attach great weight to this witness' testimony. As far as the record reveals, nothing having been established to the contrary, both the gasoline tank on the boat, and the equipment on the dock were all in proper working condition up until the time this accident took place. The crucial point is, what was the condition of this equipment during the moments that the gasoline escaped? Was the gasoline tank on the boat leaking, or was the equipment on the dock defective in some way? As to these points the record is silent.

A number of witnesses testified in this case regarding what they saw take place on the fateful day of the explosion. The court must conclude that the substance of their testimony did not sustain the burden that libelants must carry in this case. See *Weaver v. Shell Company of Cal.* (1936), 13 C.A. 2d 643; and *Weaver v. Shell Oil Company of California* (1939), 34 C.A. 2d 713. As in the case of *Weaver v. Shell Oil Co. of Cal.* (1936), 13 Cal. App. 2d 643, the facts adduced at the trial show no more reason for inferring that the accident occurred through the negligence of respondents than it did through the negligence of the fishing boat. Speculation cannot take the place of evidence, and if the court were called upon to make findings in favor of libelants in the instant case it could not do so. Respondents have produced evidence which in the court's view is consistent with the premise that the explosion and fire resulted from a defective condition of the gasoline tank aboard the *Santa Lucia*.

Libelants have failed to sustain the burden of proving otherwise by a preponderance of the evidence.

In accord with the foregoing,

It Is Ordered That a decree be entered herein upon findings of fact and conclusions of law in favor of respondents, and against libelants. The respective parties to pay their own costs.

Dated: January 12th, 1956.

/s/ MICHAEL J. ROCHE,
Chief Judge, U. S. District
Court.

[Endorsed]: Filed January 12, 1956.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above-entitled cause coming on for trial on the 30th day of November, 1955, before the Honorable Michael J. Roche, Chief Judge, United States District Court, sitting without a jury; Morton L. Silvers, and Robert Morgan of Morgan and Beauzay, appearing as proctors for Libelants, Frances Cardinale, et al., and M. K. Taylor and Frederic G. Nave, of Boyd & Taylor, appearing as proctors of Respondent, Union Oil Company of California, a corporation; and the court having heard the testi-

mony and having examined the proofs offered by the respective parties, and the cause having been submitted to the court for decision and the court being fully advised in the premises now makes its findings of fact as follows:

Findings of Fact

1. On September 28, 1954, shortly before 5:30 o'clock p.m. the fishing boat Santa Lucia came into the Union Oil Dock at Avila, California, in order to take aboard gasoline.

2. That as the fishing boat Santa Lucia came into the Union Oil Dock, the tanker "Lompoc," which was standing at least two hundred to two hundred fifty feet away, was finishing the loading of almost one and one-half million gallons of Orcutt enriched crude oil, which it had been loading for some six and one-half hours before the appearance of the Santa Lucia. This fuel, Orcutt, is highly volatile, containing approximately seventeen per cent natural gasoline.

3. The dock attendant, an employee of the respondent, Union Oil Company, passed a gasoline hose down to the fishing boat Santa Lucia, which was standing approximately fifteen feet below the dock, and opened the valves at the meter allowing gasoline to flow into the gasoline lines. As decedent took the hose, the dock attendant asked him approximately how much gasoline he would need. Decedent replied about thirty (30) gallons. Decedent

then placed the nozzle into the fill opening of the gasoline tank, which opening was flush with the deck, and commenced fueling operations. The nozzle of the gasoline hose was a spring located type and so constructed that to permit the flow of gasoline through the nozzle a lever was opened by manual pressure and to stop the flow the lever was merely released.

4. That the gasoline tank aboard the fishing boat Santa Lucia was located under the deck, held there by hangars, and could only be seen by someone below decks. That decedent had complete control, once the hose was passed to him, of the flow of gasoline into the tank. As there was a shut off at the end of the hose, decedent could have stopped the flow of gasoline at any time.

There was a meter which measured the flow of gasoline, which stood approximately twenty-six inches high above the floor of the dock, and was located six feet back from the edge of the dock, where it could not be seen by decedent in the boat, located as it was, below the dock. A meter reading taken some time later indicated that fifty-eight gallons of gasoline had been delivered out of the storage tanks on the dock.

6. The fishing vessel's gasoline tank had a maximum capacity of about forty gallons. No gasoline spilled on the dock of the fishing boat Santa Lucia showing that decedent had not allowed the tank to overfill.

7. Approximately one and one-half hours before the Santa Lucia commenced fueling an inspection of the boat for insurance purposes had been made by a Captain Hansen, an experienced marine surveyor. It was his opinion that at the time of his inspection the fishing boat was seaworthy and that its gas tank was in sound condition. That on a prior inspection, approximately one year before the accident, Captain Hansen found and reported the fishing boat to be in poor housekeeping, the wiring in poor condition and the boat to be generally filthy and dirty. The same general conditions were found to exist when Captain Hansen again inspected the boat on or about the 10th day of September, 1954, or within a few weeks prior to the accident. At no time did Captain Hansen make any examinations of the gas tank other than running his hand over the top of the tank and feeling the valves. He did not know of what material the tank was made, nor its capacity, and he did not run any pressure test on the tank.

8. That gasoline vapors accumulated in the hold of the fishing boat resulting in a tremendous underwater explosion aboard the fishing boat. That the explosion and fire resulted from a defective condition of the gasoline tank of the fishing boat Santa Lucia.

9. That there was no causal relationship between the fueling of the tanker "Lompoc" and the explosion and fire aboard the fishing boat Santa Lucia or the following fire on the marine service dock.

10. That the fueling equipment on the dock was not defective. Nor was there any defect in the gasoline storage tank on the dock or the lines that run from the tank to the meter. The gasoline storage tank itself was not ruptured or blown up, and the gasoline that was in the storage tank itself was salvaged and used later. All of the pipes and connections running from the gasoline storage tank to the meter were determined to be sound.

From the foregoing facts the court concludes as follows:

Conclusions of Law

1. Libelants have failed to produce sufficient evidence against the respondents that they were responsible for the explosion and fire resulting in the death of decedent.

2. That Libelants have failed to produce any evidence showing any causal relationship between the fueling of the tanker "Lompoc" and the explosion and fire aboard the fishing boat Santa Lucia.

3. That from the evidence in this case the inferences of negligence is such that the court finds as a matter of law that the explosion and fire resulted from a defective condition of the gasoline tank aboard the fishing boat Santa Lucia.

4. That Libelants have failed to sustain the burden of proof that the death of decedent was due to any negligence or omission on the part of the respondents.

5. That Libelants have not proven the allegations of their Libel or their several theories set forth therein.

6. That Libelants are not entitled to recover any damages from the respondents herein upon their Libel filed herein.

7. That judgment be entered herein, upon these findings of fact and conclusions of law for the respondent.

8. That each party pay their own costs in this action incurred.

Dated: This 30th day of January, 1956.

/s/ MICHAEL J. ROCHE,

Chief Judge, United States
District Court.

Receipt of copy acknowledged.

Affidavit of Service by Mail attached.

Lodged January 17, 1956.

[Endorsed]: Filed January 30, 1956.

In the United States District Court for the Northern District of California, Southern Division

No. 27098

FRANCES CARDINALE, et al.,

Libelants,

vs.

UNION OIL COMPANY OF CALIFORNIA, a Corporation, et al.,

Respondents.

JUDGMENT ON FINDINGS
OF COURT FOR DEFENDANT

The above cause came on for trial on the 30th day of November, 1955, and was duly submitted for consideration and decision, and the Court, after due deliberation rendered its decision, and on the 30th day of January, 1956, made and filed its findings of fact, conclusions of law, and order for judgment.

Now, Therefore, pursuant thereto, it is determined by the Court that Libelants take nothing by this action and that each party bear its own costs.

Dated: This 30th day of January, 1956.

/s/ MICHAEL J. ROCHE,

Chief Judge, United States
District Court.

Lodged January 17, 1956.

[Endorsed]: Filed January 30, 1956.

[Title of District Court and Cause.]

OBJECTIONS AND AMENDMENTS TO PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW, AND PROPOSED COUNTER FINDINGS AND CONCLUSIONS OF LAW

Come Now the Libelants and Object to the Following Proposed Findings of Fact:

1. That portion of paragraph 4 reading:
“The decedent had complete control, once the hose was passed to him, of the flow of gasoline into the tank.”
2. That portion of paragraph 5 reading:
“A meter reading taken some time later indicated that fifty-eight gallons of gasoline had been delivered out of the storage tanks on the dock.”
3. The first sentence of paragraph 6.
4. Those portions of paragraph 7 reading:
“That on a prior inspection, approximately one year before the accident, Captain Hansen found and reported the fishing boat to be in poor housekeeping, the wiring in poor condition and the boat to be generally filthy and dirty.
“At no time did Captain Hansen make an examination of the gas tank other than running his hand over the top of the tank and feeling the valves.”

5. That portion of paragraph 8 reading:

“That the explosion and fire resulted from a defective condition of the gasoline tank of the fishing boat Santa Lucia.”

6. All of paragraph 9.

7. Line one of paragraph 10.

Objection is further made to the alleged Conclusions of Law on the ground that said Conclusions are inconsistent with the Findings of Fact, the opinion of the Court filed herein, and the undisputed evidence produced at the trial of the instant action.

Libelants Propose the Following Additional Findings of Fact if the Proposed Findings of Respondent are Used

1. Insert at line 20, paragraph 3, the following:

“The dock attendant knew that the custom of fishing boats like the Santa Lucia was to request gasoline in an amount sufficient to fill the gasoline tank to capacity.”

2. In the place and stead of the portion objected to in paragraph 4:

“That decedent controlled a spring type nozzle which could stop the flow of gasoline; that before any gasoline could flow to said nozzle, the Union Oil Company dock attendant Charles Caldwell was required to, and did, initiate the flow of gasoline from the gasoline storage tank located on the dock by turning two hand valves located dockside; that said dock attendant could

stop the flow of gasoline to said nozzle by two turns of said hand valves; that said Charles Caldwell could see the meter showing the quantity of gasoline delivered; that decedent could not see the meter; that the custom of the industry in supplying gasoline to a boat from which the operator could not see the meter was to shut off the gasoline when the amount requested was delivered; that said Union Oil Company dock attendant had the duty to watch the meter and inform the decedent of the reading and to cut off the supply of gasoline when the quantity ordered had been delivered; that gasoline was being delivered at a rate of approximately 5 gallons per minute; that said dock attendant carelessly did not look to see or inform the deceased of the amount delivered or of the fact that the ordered quantity had been delivered; that the neglect of the said dock attendant resulted in producing an excess quantity of gasoline of approximately 20 or 25 gallons with accompanying excess gasoline fumes, the loss of 4 or 5 minutes time for decedent and other members of the crew to clear the boat, the production of an explosive mixture of gasoline vapor in the hold of said boat, and thus proximately cause the death of Frank Cardinale.”

3. In the place and stead of the portion objected to in paragraph 5:

“That said Union Oil dock attendant, after the gasoline fueling operation had been under

way for sometime, looked at the meter and observed a reading of about 20 gallons; that he did not look again at the meter until about 5 to 10 minutes later when he noticed that about 58 gallons had been registered on the meter."

4. In the place and stead of the first sentence of paragraph 6:

"The fishing vessel's gasoline tank had a maximum capacity of about 35 to 40 gallons."

5: In the place and stead of those portions objected to in paragraph 7:

All reference to the inspection approximately one year before the accident should be deleted.

Change lines 23 to 25 to read: "A complete visual inspection was made, and, in addition, Captain Hansen ran his hands over the top and bottom of the tank, felt and tested all fittings and valves, and detected no odor of gasoline."

6. In the place and stead of the portion objected to in paragraph 8:

"There is no direct evidence as to whether said vapors resulted from the escape of gasoline from defective dockside equipment of the respondent's or a gasoline tank leakage aboard the boat."

7. The word "following" should be omitted from line 3, paragraph 9.

8. In the place and stead of the portion objected to in paragraph 10:

"There is no direct evidence as to the condi-

tion of the meter, pipes and hoses therefrom to the Santa Lucia at the time of the accident.”

9. The deceased Frank Cardinale was not guilty of any contributory negligence and the second defense of contributory negligence is untrue.

Libelants Do Not Believe the Proposed Findings of Respondent Should Be Used at All and Propose the Following Counter Findings

Findings of Fact

1. The allegations contained in paragraphs I, II, III, IV and V of the libel are true.

2. The deceased, Frank Cardinale, was not guilty of any contributory negligence and the allegations contained in the separate and distinct defense and plea of contributory negligence are untrue.

3. That, prior to the explosion aboard the Santa Lucia, a white flash occurred on the respondent Union Oil Company's dock, burning the face of the Union Oil Company dock attendant, Charles Caldwell; that this flash was witnessed by seaman Garret Ray from the deck of the tugboat Avila, approximately 50 feet away; that the Union Oil Company had exclusive control of said dock; that this flash resulted in and caused an explosion of gasoline fumes in the hull of the Santa Lucia; that the matter speaks for itself; that the fumes in the hull of the Santa Lucia were not ignited until after the ignition flash on the dock; that the dock and the instrumentalities thereof were under the exclusive

control of the respondent; that the ignition flash on the dock is an accident that does not ordinarily happen in the absence of negligence; that the ignition flash on the dock which preceded the explosion was not due to the voluntary act or contributory fault of the deceased.

4. That neither the libelants nor respondent have produced any evidence rebutting the doctrine of *res ipsa loquitur*, and the libelants have thereby established a *prima facie* case and an inference of negligence which remains unrebutted. The Court cannot decide whether the gases which accumulated in the hull resulted from defective equipment dockside or a failure in the gasoline tank aboard the boat. The ignition flash on the dock of the respondent proximately ignited the fumes in the hull regardless of the source of the fumes and proximately caused the death of the deceased.

5. That respondent further negligently supervised the fueling of the *Santa Lucia*; that respondent failed to observe, watch and control the quantity of gasoline moving from respondent's dock toward said vessel, permitted, negligently, more gasoline to move from said dock to said vessel than the quantity ordered, to wit, about 58 gallons instead of about 30 gallons, and failed to warn decedent thereof, depriving decedent of an opportunity to evacuate the vessel, and as a proximate and direct result of the foregoing caused the death of Frank Cardinale.

6. That libelants have been damaged in the sum of \$.

Conclusions of Law

That libelants are entitled to a judgment from respondent for the sum of \$., together with their costs of suit incurred.

Wherefore, libelants pray the proposed findings of respondent be rejected and the Court make findings in accordance with those submitted herewith.

MORGAN & BEAUZAY, and
MORTON L. SILVERS,

By /s/ MORTON L. SILVERS,
Proctors for Libelants.

[Endorsed]: Filed February 29, 1956.

[Title of District Court and Cause.]

ORDER EXTENDING TIME WITHIN WHICH TO FILE OBJECTIONS TO PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

Good cause appearing therefor, and upon Stipulation of the parties hereto,

It Is Hereby Ordered that libelants may have to and including February 13, 1956, within which to file objections to the proposed Findings of Fact and Conclusions of Law submitted by respondents.

Dated: January 19, 1956.

/s/ MICHAEL J. ROCHE,
Chief Judge, United States
District Court.

[Endorsed]: Filed January 19, 1956.

[Title of District Court and Cause.]

ORDER EXTENDING TIME WITHIN WHICH
TO FILE OBJECTIONS TO PROPOSED
FINDINGS OF FACT AND CONCLUSIONS
OF LAW

Good cause appearing therefor, and upon Stipulation of the parties hereto,

It Is Hereby Ordered that libelants may have to and including February 29, 1956, within which to file objections to the proposed Findings of Fact and Conclusions of Law submitted by respondents.

Dated: February 14th, 1956.

/s/ MICHAEL J. ROCHE,
Chief Judge, United States
District Court.

[Endorsed]: Filed February 14, 1956.

[Title of District Court and Cause.]

Michael J. Roche, District Judge.

MINUTE ORDER—MARCH 14, 1956

After arguments by respective counsel, Ordered that objections to Findings and the Proposed Findings stand submitted.

[Title of District Court and Cause.]

ORDER

The plaintiff has filed objections and amendments to the proposed findings of fact and conclusions of law of defendant and has proposed counter findings and conclusions of law; the court having considered the record before it hereby Orders that said objections and amendments be overruled and the proposed counter findings and conclusions of law be disallowed.

Dated: April 10, 1956.

/s/ MICHAEL J. ROCHE,

Chief Judge, U. S. District
Court.

[Endorsed]: Filed April 10, 1956.

[Title of District Court and Cause.]

Michael J. Roche, District Judge.

MINUTE ORDER—DEC. 18, 1956

This cause came on this day ex parte for hearing on Respondents' motion to enter nunc pro tunc an

order setting aside the Findings of Fact and Judgment heretofore signed, filed and entered on January 30, 1956. Morton Silver, Esq., appeared for Libelants, and Fred Nave, Esq., appeared for Respondents. After arguments by respective counsel, It Is Ordered that said motion be, and the same is hereby, Denied.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that the above-named Libelants hereby appeal to the United States Court of Appeals for the Ninth Circuit from the Order Denying Libelants' Motion for Order Nunc Pro Tunc Setting Aside Findings of Fact, Conclusions of Law and Judgment thereon, made and entered on the 18th day of December, 1956, and from the whole thereof.

Dated at San Jose, California, this 12th day of March, 1957.

MORGAN & BEAUZAY, and
MORTON SILVERS,

By /s/ LUTHER CLARK,
Proctors for Libelants and
Appellants.

[Endorsed]: Filed March 13, 1957.

[Title of District Court and Cause.]

STATEMENT OF POINTS ON APPEAL

Libelant-Appellant herewith present the points upon which they claim the Court erred:

1. The District Court erred in allowing the judgment to be entered on January 30, 1956.

2. The District Court erred in refusing to enter a written order in conformity with its oral order of March 14, 1956, thus depriving Libelant-Appellant of due process of law by jeopardizing Libelant's rights of appeal, without knowledge of Libelant.

3. The District Court erred in denying the Libelant's Motion to enter an Order Nunc Pro Tunc setting aside findings of fact, conclusions of law and judgment thereon.

MORGAN & BEAUZAY, and
MORTON L. SILVERS,

By /s/ LUTHER A. CLARK,
Proctors for Libelants.

[Endorsed]: Filed March 13, 1957.

The United States District Court, Northern District
of California, Southern Division

No. 27098—Admiralty

FRANCES CARDINALE, et al.,

Libelants,

vs.

UNION OIL COMPANY, et al.,

Respondents.

Before: Hon. Michael J. Roche, Judge.

Appearances:

For the Libelants:

ROBERT MORGAN, ESQ.

For the Respondents:

M. K. TAYLOR, ESQ.

SETTLEMENT OF FINDINGS

The Clerk: Cardinale versus Union Oil Company, settlement of findings.

Mr. Morgan: May it please the Court, I wish to thank the Court for giving us this time to argue the matter. With the importance of the matter it takes some time to actually argue the matter before the Court. Mr. Silvers called to my attention that by inadvertence, although the Court had signed orders extending our time within which to file objections and exceptions through the date that we filed them, that is, February 29th, by inadvertence the findings

had been signed and judgment entered, and in order to make this a proper proceeding I move the Court to set aside the findings of fact and judgment so that we may object to them.

The Court: No objection.

Mr. Taylor: No, no objection, Your Honor.

The Court: So ordered.

Mr. Morgan: Thank you. Your Honor, this case is quite familiar to the Court, and I am not going to bore the Court with a recital of the basic facts which I know the Court has in mind. The things I want to mention to the Court I want to mention in four different veins. First, it is our position that the findings of fact as submitted by the respondents do not correctly state the facts as set forth in the opinion. In [2*] this regard we feel that the findings of fact will not represent the trial court's opinion. For example, the trial court was very clear in its opinion that there was no evidence one way or the other as to where the gasoline escaped, and the exact words that the Court said were:

“The crucial point is what was the condition of this equipment during the moments the gasoline escaped? Was the gasoline tank on the body leaking or was the equipment on the dock defective in some way? As to these points the record is silent.”

With the opinion of the Court so expressed, findings of fact were submitted directly contrary:

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

“That the explosion and fire resulted from a defective condition of the gasoline tank on the fishing boat Santa Lucia, and secondly that the fueling equipment on the dock was not defective.”

which, of course, if this is the Court's opinion, makes it almost impossible to view the matter as we view the matter. In other words, we feel this way, that the trial court's opinion, which sets forth its thoughts, your opinion, Your Honor, states that upon this crucial point the record is silent and we have not upheld our burden of proof. That is, of course, one question.

Another question is to change it around as the defendants have or the respondents have and to say that the gasoline tank [3] was defective, the equipment on the dock was not defective, because those findings, if so made, will have a direct bearing upon the case, except that I believe the findings of the Court will ultimately reflect this Court's opinion rather than findings which counsel may wish the Court to make contrary to the Court's actual opinion of the facts.

There is one thing and I want to discuss it seriously because I feel that in arguing this case we failed to properly argue the case to the Court. First, I realize that if I can at this stage show the Court under the evidence as the Court finds it that we have established the case, it is not yet too late to receive judgment in this case. And I know the Court will not object to my urging for Mrs. Cardinale and her

children the legal theory which I feel we failed to thoroughly argue before the Court, and that is this. It is so simple that I uttered it only once during the trial. If Your Honor please, I said once during the trial to the Court, "Counsel for the respondent takes great delight in the fact that it may be the gasoline tank which is defective, and whether it was the gasoline tank that was defective or whether it was the dock equipment that was defective, in either instance, as I view the matter, as a matter of law, here the Union Oil is liable."

Why is that? Because if that is true, then we would be entitled to a judgment, because of this fact: There was a gasoline dock, there was a gasoline attendant, and taking [4] Caldwell's testimony alone, as a matter of law, if I understand the law correctly, there was a duty which was breached which proximately caused the death of Mr. Cardinale. What is that duty? It is the duty of a gasoline attendant, whether at a filling station or a marine dock, to so exercise ordinary care in the fueling of a vessel as to not cause the gasoline to overflow. I say that, and we quoted with that argument a case involving a gasoline tank which overflowed in the filling, a gasoline tank which overflowed in the filling both to retail automobiles and also by wholesalers to retail dealers. In other words, I would urge the Court this, that if Your Honor or I go into a gasoline station, and whether we say, "Give me 30 gallons," or whether we say, "Give me about 30 gallons," if the gasoline attendant, as in one case I cited to the Court, goes in back of this truck and

reads a comic book or goes into the station and neglects the operation, and if it overflows and there is an explosion and fire, then he is responsible for the damage.

Now, if the Court will find on this fact as we have requested in our findings, even if the Court disagrees with us on that point, then the point of law can be ruled upon, but without a finding as to whether there was a duty on the part of Mr. Caldwell to supervise the loading of this vessel, without a finding in that regard, then, of course, if the Court or if the Union Oil Company is wrong on their approach [5] to the law, then it would not be reviewed.

With respect to that issue I urge the Court that not only the cases but it is a matter of convenience that the person who goes in to get gas for his car, a highly dangerous substance, should have the right of supervision, but how much more here, Your Honor, when, as you found in your opinion, my client's husband could not see the meter? In other words, this dock was so constructed that my client's husband, now deceased, or any other person coming to that dock could not see how much gas was being put aboard.

The Court: But he had control of the nozzle.

Mr. Morgan: Yes; Your Honor, but——

The Court: And coupled with that there was no spillage.

Mr. Morgan: May I just pose this to Your Honor: The fact that the particular harm, the spillage type of harm which the Court thinks of im-

mediately as loading too much, does not take place but another type of harm takes place, does not remove the proximate causation.

Let me also suggest that the mere fact that a person loading gasoline in a car or a boat holds the nozzle does not free the person who can see the meter from turning off the two valves which turned the gasoline on, and whether or not he controlled the nozzle, isn't there a duty of care on the part of Mr. Caldwell to inform Mr. Cardinale that 20 gallons had been placed aboard the ship, which he didn't do, and isn't [6] there a further duty to inform him that you have taken 30? Why have the meter? As the Union Oil use it the meter is there only to determine the charge. As we view it the meter is to determine the volume.

If Your Honor please, we had a great deal of testimony as to the custom in the marine industry. We brought in fishermen. Defendants brought in a member of so-called fire protection committee, which as I view it, it is a committee to keep down financial losses of another company, a man who would certainly be biased in his testimony, and his testimony as to his motorboat would hardly be decisive as to the custom in the fishing industry, and if the custom, aside from the control of it, if the custom was, as was testified by all the fishermen who testified, if the custom was that the dockside attendant who can see the meter would cut off the supply of gasoline as requested, then wasn't Frank Cardinale entitled to the proper performance of that custom rather

than to a breach of that custom that Caldwell unashamedly admitted that he did? How would that affect it? In this case, as I view it, it deprived my client's husband of between four and five minutes to evacuate the boat and save his life. We know according to the testimony, although the findings do not report it, and we ask the Court to so find, that approximately five gallons a minute is loaded from that gravity flow tank, and if that is the case, if the capacity was 35 to 40 gallons loaded, then had my [7] client been told when the 30 point was reached, and had he been given a chance to note that the tank was not filling, if that is what happened, then my client would have gotten a wooden pole, tested the depth of that tank, determined that the gasoline was not in it, and given a warning to the crew and had an opportunity himself to be alive this date. I say a gasoline dock attendant is more than a cashier. He is a specially trained person. Mr. Caldwell, I urge the Court, had certain positive duties to my client. If that argument does not appeal to the Court, then of course all I can ask for is to find contrary to my argument. I mean I hope I have not misrepresented the facts. I think what I have said factually is correct. But if the legal import of the facts I have represented to the Court is incorrect, even if the facts are found as I honestly believe the record shows them, then if my position is correct we can have some remedy.

If Your Honor please, as far as the doctrine of *res ipsa* goes, *res ipsa loquitur*, again we did not make our point on that particular doctrine because it was our point that a flash fire occurred on the

dock, not that res ipsa compelled the finding that the gas came from the dock. We wanted to make the point that whether the gas came from the tank, which we did not think it did, or from the Lompac, which we thought it might have, that if the fire occurred on the dock, which was an instrumentality exclusively in the control of the respondents, [8] if this was the case, and if a flash fire occurred on the dock, since that is not the sort of thing that ordinarily occurs, and since our client would ordinarily have nothing to do with the flash fire, that the flash of the fire which ignited the hold would be the responsibility of Union Oil.

In this regard there was not mentioned in the respondents' facts submitted to the Court the fact that there was a white flash seen first, followed a second or two later by the explosion which Mr. Rowe testified to. There wasn't mentioned in Mr. Pedrizi's testimony that Mr. Caldwell grabbed or turned and ran to the rear and grabbed this red object, which we thought was the fire extinguisher, and there was not mentioned the fact that Mr. Caldwell suffered the burns about his face, which we feel are very important, because this white flash which hit Mr. Caldwell on the dock was a flash fire which originated on the dock. If we think only of the gasoline tank erupting, where would the fumes be? Just in the hull of the vessel. How then could Mr. Caldwell have had his face seared by this white flash which hit him and spun him around? He might have been hit by an object, but for a flash fire to have engulfed the dock, as the testimony showed, then we think from that fact the Court may—I do not think

the Court is compelled to by any chance—but we think the Court may reasonably conclude that the flash originated on the dock exclusively in Union Oil's control. [9]

But whether the Court concludes in that regard or not, and we realize that the Court's opinion is fully justified—I mean I would not argue about the opinion with the Court for, as the Court said in its opinion, “I don't know where the gas came from, whether it came from the gas tank or the dock,” because that is an opinion which is an opinion which frankly I myself for many months had not made up my mind about. But we do feel that beyond the opinion, and unexpressed in the opinion, and we ask the Court's thought and opinion in the findings, is, one, the fire started on the dock regardless of where the gas came from and, two, Caldwell owed a duty to warn Cardinale about the quantities and volume of gas going aboard, and his failure to give him any warning deprived him of time, which cost him his life.

I did find, in addition to the cases which I phoned to the Clerk following my argument, a case which on a question of causation I would think would be of some importance. The case is the case of Johnson versus Commerce Portland Cement Company, 64 Federal 2nd, 193, which is a Sixth Circuit Court decision. In that case some people were working in the hold of a ship where there was gas, and lightning struck and exploded the gas and killed everybody in the hold of the ship, and the question was one of proximate causation. Should they have, when they knew the gas was there, should they have

reasonably foreseen that lightning could strike or something could have happened [10] to explode it, and the Circuit Court quoted Section 310 to the effect that if the actor's conduct is a substantial factor in bringing about the other's injury, the fact that the actor had not foresaw or should have foreseen the extent of injury or the manner in which it occurred does not prevent him from being liable.

I feel that Mr. Cardinale should have foreseen. If a man asked for 30 and, as I understand it, there is some testimony with respect to custom when you ask for gasoline, but he should have foreseen at least spillage on the deck. In other words, if you give more than you have been asked for, at least it should have been foreseen. The Court will agree with me on that. And the mere fact that in this case instead of spilling on the deck, that some of it went below, if we assume that to be the fact, the mere fact that that particular type of thing was not foreseen by him does not prevent him from being legally responsible to Frances Cardinale and the children if it caused the death of Frank Cardinale. And on the testimony of Caldwell alone I would feel that there is liability on the part of Union Oil, and I am not going to quarrel with the Court's opinion with respect to the preponderance of proof, because I know that the Court listened intelligently to a mass of testimony which sometimes bored me about the Lompac and about the gasoline tanks, the inspections, and so forth, but based upon the simple facts, which I ask the Court to find, and I want to [11] repeat them in closing, I

ask the Court to find on these facts, and after reconsideration, if the Court feels that these facts as a matter of law require a recovery on the part of my client, to enter an appropriate sum for my client, and in summary they are, one, the flash fire did occur on the dock, and there is the testimony of a number of people which I mentioned and inferences; two, Thomas Caldwell had a duty imposed by law by the custom of the industry to inform Frank Cardinale when the amount requested had been delivered and he did not do that. That resulted in Frank Cardinale being deprived of four to five minutes' time, during which time his life would have been saved. I know if the Court agrees with me, the Court will have no fear in ordering judgment for my client. The mere fact that the opinion did not consider this argument before certainly would not hold the Court back, because I know the Court is going to give the decision the way he thinks it. But I ask the Court not to sign the findings submitted by the defendant which are squarely contrary to its opinion, even though it may make the judgment, perhaps nail the lid down tighter on the libelant. Thank you very much for giving me this time and for the Court's courtesy.

Mr. Taylor: May it please the Court and Mr. Morgan, Your Honor, the argument which counsel has just made was the type of argument that was made before the case was submitted. It was an argument on the facts that was made to the Court [12] during the closing arguments, I believe while the argument has been made, it is not proper at this time because it is not on the objections to the findings

that have been submitted by counsel, and the amendments that they have proposed.

Your Honor, when we prepared the findings in this case we went down Your Honor's memorandum opinion almost word for word, and I have taken the trouble here to underline the findings of facts that have been complained of as against the objections that have been made, and only in one or two cases has there been one or two words either added for the purpose of clarification or explanation. For example, the first objection was that in paragraph 4, that these gentlemen—this is the wording that they objected to—that these gentlemen had complete control once the hose was passed to him of the flow of gasoline into the tank. On page 2 of Your Honor's opinion there is almost the identical wording. These gentlemen had complete control once the hose was passed to him of the flow of gasoline into the tank. I do not think there are any objections that have been cited—there are seven, I believe—I do not think any of those seven objections have any foundation in fact as objections, because they follow Your Honor's memorandum opinion almost identically, word for word. We did that intentionally as to the findings of fact that have been complained of. We in that regard followed Your Honor's memorandum opinion almost word for word. There [13] were a few words added for clarification, but certainly none of the findings of fact that we asked Your Honor to sign deviate from or are in any way different from the findings as found in Your Honor's memorandum opinion.

Answering counsel's argument about the fact that the fire started on the dock, that is a question of fact. There was testimony—I do not recall any particular witness having testified just exactly where this fire did start, whether it started on the boat or whether it started on the dock. I do not recall of any testimony directly on the point, and I think Your Honor so indicated in the memorandum opinion. The closest witness to the scene who was looking directly at the scene—there were two of them—one was Caldwell himself and the other one was a seaman Ray. Seaman Ray testified that he saw this flash and it came from the direction of the dock and the Santa Lucia. He was standing in such a position where he was looking directly at the stairs of the Santa Lucia and at the dock at the same time. I mean the Santa Lucia was portside, too, and he could take in his vision that entire scene, and he said the flash and explosion came from that direction and he could not pinpoint it as to whether it was on the boat or whether it was on the dock. Mr. Caldwell says he was looking over, he was standing on the dock looking over the side, watching Frank Cardinale take the sounding stick and place it into the fuel pipe; he was looking directly at it, and [14] he received the full force of this blast in his face. There were burn marks on his face. He had some burn pock-marks on his chest. He had no such burn marks about the back of his head or the back of the T shirt that he was wearing. There is a conflict—I will admit there is a conflict with one of the seamen who said that he saw Caldwell make a turn, step

back and make a turn. That is conflicting testimony, and Your Honor has found already in favor of the respondents, which would include the finding that the flash fire did not occur on the dock, and therefore Your Honor has already decided that point on the conflicting testimony, and I do not think Your Honor now, just in view of the argument here, that Your Honor should find that the fire started on the dock, that Your Honor will do so. The burden was upon the libelants to prove by a preponderance of evidence that the fire did start on the dock, and as Your Honor points out, they failed in that burden. These are apparently the only two points relied upon by counsel, although they have enumerated more in their objections and proposed counter findings.

The other is with reference to the duty owed by Charles Caldwell, the attendant. That, too, in our opinion, the duty with reference to the custom was something that there was conflicting evidence upon, as to whether or not, or just exactly what the custom was. There was testimony that when a person ordered a certain amount, that was more for the purpose [15] of a sale, that was more for the purpose of determining whether or not they had their credit to purchase that amount, and inasmuch as the recipient of the sale had full control over the nozzle, it was up to the recipient of the gas to turn it off when they felt that they had an adequate amount, that there was no duty upon the vendor, the attendant, to stand there and watch the meter, and the instant it reached a certain figure to turn it off.

There was conflicting evidence on that point, and Your Honor made no finding as to custom and we do not believe that custom in this case was material, as to just what the custom was. We do not believe that that is a material finding. It was not mentioned in the memorandum opinion and we did not include it one way or the other in the proposed findings, and we would object to it being added to the proposed findings, because we do not believe it is material.

I am not familiar with the case cited by counsel with reference to the lightning striking the ship, but I am sure Your Honor did review the cases that were cited by both respondent and libelant in coming to the conclusion that Your Honor did. Your Honor found after hearing the evidence pro and con for many days that there was no responsibility on the respondents, there was no proof of any negligence on their part, and Your Honor so indicated in the memorandum opinion. Thank you.

Mr. Morgan: May it please the Court, we are of one mind, [16] then, because as I understand counsel's statement, he says that the findings were taken from your opinion, and I will concede that. I do not think the Court intended to draw findings when it wrote its opinion, and I think it is clever of respondents to adopt the opinion as findings.

The Court: Not necessarily. You are not limited to my opinion. It goes to the evidence of the case.

Mr. Morgan: As I understand the Court's opinion, though, the Court's opinion is just the way I quoted it to the Court: Was the gasoline tank on the boat leaking or was the equipment on the dock

defective in some way? And the Court said, "As to these points the record is silent." The respondent presented findings of fact squarely contrary to that recital. The Court was asked to find, one, the gas tank was defective, and, two, the equipment on the dock was not defective, and that finding will take persuasion of your mind subsequent to the opinion.

The Court: I concluded it could not be otherwise.

Mr. Morgan: Right.

The Court: To be perfectly frank with you.

Mr. Morgan: All I wanted to do was to make sure the findings were the Court's opinion, because it would be so easy to take an opinion in the respondent's favor and to draft findings that would favor the opinion that might not be the trial court's opinion, and if the Court's opinion is that, then I am left with just two major arguments: First, [17] the argument that I made that there was no finding as to custom. Counsel concedes that, and the Court's opinion does not cover that, nor does it cover the duty of the gasoline attendant, nor does it cover the issue as to whether there is proximate causation between the escaping in the hold rather than going out on the deck, and I would ask the Court to write an opinion, after due consideration of those points, and I think the Court will—I hope the Court will, considering those points which are not covered in the opinion, conclude with me that there was a custom.

The Court: Did you draw up some findings in that respect?

Mr. Morgan: Yes.

The Court: Read them, with respect to custom.

Mr. Morgan: With respect to custom we offered the proposed finding on page 2, lines 16 through 18. The dock attendant knew the custom of fishing boats like the Santa Lucia was to request gasoline in amounts sufficient to fill the gasoline tank to capacity, and on the same page, line 26, that decedent could not see the meter, that the custom of the industry in supplying gasoline to a boat from which the operator could not see the meter was to cut off the gasoline when the amount requested was delivered, that the Union Oil Company dock attendant had the duty to watch the meter and inform the decedent of the reading and cut off the supply of gasoline when the quantity ordered had been delivered. [18]

The Court: What was the case that you cited?

Mr. Morgan: I cited Sanders vs. Austin, 180 Cal. 664; Weaver vs. Shell Oil Company, 34 Cal. App. 2nd, 713, and Pinter vs. Wenzel, 180 Northwestern 120, and finally the last case was Standard Oil vs. Evans, 122 Southern 735. All of those cases are directed to the positive duty of a gasoline attendant to prevent the overflow of gasoline, and the lightning case, the Court did not get the citation on that, that lightning case was 64 Federal 2nd, 193.

The Court: I will check those cases.

Mr. Morgan: Thank you very much for your courtesy. There is one thing I forgot and that is, there was no finding on the defense of contributory

negligence which, of course, if there is no negligence, you would not actually have to find on the matter, but the libelant would appreciate a finding if the Court will give us a finding in that regard.

The Court: The matter stands submitted.

Mr. Taylor: Your Honor, may I make this one observation on the contributory negligence. I will agree with counsel that if there is no negligence found, it is not necessary to make a finding, but I do not think it is material in this case to make a finding on contributory negligence. I would like to remind your Honor that there are other cases pending, and it may have some bearing on this. What it may be I do not know, but I do not think it is necessary for a finding to appear on [19] contributory negligence in this particular case.

Mr. Morgan: In answer to that, I feel whatever judge who tries any other cases, or for that matter, if your Honor tries the other cases, that your Honor—in other words, if you will cover this defense which was before you, then whoever hears it will have the benefit of that decision.

The Court: Let us pause for a moment. Where is the contributory negligence?

Mr. Morgan: I do not see any.

The Court: I will have to so find.

Mr. Taylor: The only element on contributory negligence was the fact of possibly poor housekeeping aboard the boat. There was evidence that prior to this date there was poor housekeeping aboard the boat. You will recall the marine surveyor's testimony, and it is in the finding, that there

had been poor housekeeping, dirty and filthy conditions.

Mr. Morgan: We do not object to that, but that is not negligence nor a defense. In other words, maybe a year before things were dirty, but there is no contributory negligence anyway.

The Court: I do not think there is any necessity of making a finding on that under the facts and testimony in relation to the issues involved.

Mr. Morgan: Of course, if the Court decides in our favor after reviewing the cases, the Court will have to decide that [20] issue.

The Court: I wish I could.

Mr. Morgan: I pray the Court will when it reads those cases.

The Court: If I thought you could sustain your theory of your case, I would have no hesitancy at all in giving you judgment. I concluded that you did not. However, I will check those cases.

Mr. Morgan: I would greatly appreciate it.

Mr. Taylor: Thank you, your Honor. [21]

[Title of District Court and Cause.]

Appearances:

For the Libelants:

MORTON L. SILVERS, ESQ.

For the Respondents:

FREDERIC G. NAVE, ESQ.

HEARING ON LIBELANT'S MOTION TO
ENTER AN ORDER NUNC PRO TUNC
SETTING ASIDE FINDINGS OF FACT,
ETC.

December 18, 1956

Mr. Silvers: Your Honor, I am appearing here this morning to request the issuance of an order nunc pro tunc to make a matter of record at this date an order which your Honor made in open court on March 14th in the case of *Cardinale vs. Union Oil*, in which the judgment prematurely entered as of that date, and the findings, were set aside in order that your Honor might hear the proposed counter findings and objections to the findings on behalf of libelants. Your Honor granted that motion.

Mr. Taylor of Boyd & Taylor, for the respondent Union Oil Company, who is in court this morning, was in court on March 14th, according to the reporter's transcript, which I have given the Court a copy of, and had no objection at that time to the issuance of the order.

The purpose of my request is simply to make a matter of record now what was apparently not entered on March 14th of this year.

Mr. Nave: May it please the Court, we will object to the entry of the order as requested. The record of the Clerk's office of this Court shows that a judgment was entered on January 12, 1956. That was the judgment your Honor entered denying recovery. Following that there was a judgment on the findings, which was entered on January 30th. And at the time of a hearing on the findings of fact, in which Mr. Silvers and his associate objected to the findings and proposed counter [2*] findings, Mr. Taylor, of our office, agreed that these objections, these findings, might be argued, but the record does not reveal, nor was there any stipulation, that the judgment was to be set aside. It is our position there has been and was a final judgment entered in this case on January 30th by your Honor, and also the judgment that was entered on the 30th was merely on findings. We want the record to show that it is our position that a final judgment has been entered in this court on January 12, 1956, and that no order or judgment nunc pro tunc is required or necessary because of the fact the record reveals that a final judgment was duly entered on January 12, 1956.

The Court: Mr. Silvers, did he recite the facts as they exist in the record?

Mr. Silvers: No, sir, I don't believe so! I am including in the record the transcript of the proceedings on March 14th, and I don't think his recital was correct in that regard. I am quoting now from the transcript: "I move the Court to set aside the findings of fact and judgment so we may object to

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

them. The Court: No objection? Mr. Taylor: No, no objection, your Honor. The Court: So ordered."

The Court: What occurred following that?

Mr. Silvers: The only matter of record following that was the issuance of an order of this Court overruling the proposed counter findings and objections. But there was no [3] entry of judgment following March 14th, when the prior judgment was set aside upon motion and stipulation, or at least lack of objection, on the part of the respondent.

The Court: Well, I have the record here, and judgment was entered on January 30th, wasn't it?

Mr. Silvers: Your Honor probably also sees in the record the issuance of order based upon stipulation between respondent and libelant, granting the libelant time to file objections until February 29, 1956. I submit that any judgment that was entered was obviously prior to that date. The motion referred to the judgment, and in the transcript, which I have provided, the motion was made for the Court to set aside the judgment, and the Court so ordered on March 14th. The Court did not order findings set aside. It says that in express terms in the reporter's transcript. I don't think we should be precluded merely because of a clerical oversight. There was no judgment filed after your Honor's order setting the prior judgment aside.

The Court: I have checked the record. Your motion will have to be denied.

[Endorsed]: Filed April 25, 1957. [4]

[Title of District Court and Cause.]

CERTIFICATE OF THE CLERK
TO RECORD ON APPEAL

I, C. W. Calbreath, Clerk of the United States District Court for the Northern District of California, Southern Division, do hereby certify that the foregoing documents are the originals filed in this court in the above-entitled case and that they constitute the record on appeal herein designated by the attorneys for the appellant:

Libel in Personam.

Petition for Guardian, Ad Litem.

Answer to Libel.

Memorandum Opinion.

Findings of Fact and Conclusions of Law.

Judgment on Findings of Court.

Objections and Amendment to Proposed Findings.

Order Extending Time to File Objections, Jan. 19th, 1956.

Order Extending Time to File Objections, Feb. 14th, 1956.

Minutes for March 14th, 1956.

Order overruling objections and amendments.

Minutes for Dec. 18th, 1956.

Notice of Appeal.

Statement of Points on Appeal.

Designation of Contents of Record on Appeal.

Deposition of Charles H. Caldwell and James B. McMillan.

Deposition of Lester C. Johnson, 2 volumes.

Deposition of James E. Hill.

Reporter's Transcripts for Dec. 19, 1955; Nov. 30, 1955; Dec. 6, 1955; Dec. 8 and Nov. 28, 1955.

Reporter's Transcripts, March 14, 1956, and Dec. 18, 1956.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court this 25th day of March, 1957.

[Seal] C. W. CALBREATH,
Clerk;

/s/ WM. J. FLINN,
Deputy Clerk.

[Endorsed]: No. 15492. United States Court of Appeals for the Ninth Circuit. Frances Cardinale, Ann F. Cardinale, Horace A. Cardinale and Frank J. Cardinale, Minors, by Frances Cardinale, Their Guardian, Ad Litem, Appellants, vs. Union Oil Company, a Corporation, Appellee. Transcript of Record. Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed March 25, 1957.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

No. 15,492

United States Court of Appeals
For the Ninth Circuit

FRANCES CARDINALE, ANN F. CARDINALE,
HORACE A. CARDINALE and FRANK J.
CARDINALE, Minors, by FRANCES CAR-
DINALE, Their Guardian Ad Litem,
Libelants,

VS.

UNION OIL COMPANY OF CALIFORNIA,
a corporation,
Respondent.

Appeal from the United States District Court
for the Northern District of California,
Southern Division, in Admiralty.

BRIEF FOR RESPONDENT.

FREDERIC G. NAVE,
BOYD & TAYLOR,
350 Sansome Street,
San Francisco 4, California,
Proctors for Respondent.

FILED

AUG 28 1957

PAUL P. O'BRIEN, CLERK



Subject Index

	Page
Statement of the case	1
Specifications of alleged errors relied upon by appellants....	3
Appellants' argument	4
Argument	4

I.

The judgment was a final judgment and an act of judicial discretion	4
---	---

II.

The judgment entered was a final judgment	9
---	---

III.

The requested order nunc pro tunc	12
---	----

IV.

Appellants were not jeopardized in their appeal rights by the denial of the motion nunc pro tunc	15
Conclusions	16

Table of Authorities Cited

Cases	Pages
Fox v. Smith, 30 Fed. 2d 869 (C.C.A. D.C. 1929)	5
Golpin v. Page, 18 Wall. 350, 21 L. Ed. 959 (1874)	9
In re Wight, 134 U.S. 136, 10 S. Ct. 487, 33 L. Ed. 865	13
Lampel v. Goldstein, 167 N.Y.S. 576 (1917)	9
McConville v. United States (C.C.A. 2, 1952), 197 Fed. 2d 680	7, 8, 15
Moore v. Smith, 177 Va. 621, 155 Atl. 2d 48	9
Noland v. Noland (1941), 44 C.A. 2d 780, 113 Pac. 2d 11..	12
Peibler v. Seawell (1954), 122 C.A. 2d 503, 265 Pac. 2d 109	12
Perrin v. Aluminum Co. of America (C.C.A. 9, 1952), 197 Fed. 2d 254	7, 15
Pickering v. Palmer, 18 N.M. 473, 138 Pac. 198	9
Sabine Hardwood Co. v. West Lumber Co., 238 Fed. 611 (D.C. Texas 1916)	5
Sandecoff v. Jackson (1920), 46 C.A. 256, 189 Pac. 111	12
Schmidt v. Terry (C.C. N.Y.), 111 Fed. 290 (1901)	9
Steccone v. Morse-Starrett Products Co. (C.C.A. 9, 1951), 191 Fed. 2d 197	8, 10
Treat v. Superior Court (1936), 7 Cal. 2d 636, 62 Pac. 2d 147	11, 12

Codes

California Code of Civil Procedure, Section 634	10
---	----

Rules

Federal Rules of Civil Procedure, Rule 60(b)	5, 6, 7, 15
--	-------------

Texts

6 Moore's Federal Practice (1953 edition) pages 3537 et seq.	13
--	----

United States Court of Appeals For the Ninth Circuit

FRANCES CARDINALE, ANN F. CARDINALE,
HORACE A. CARDINALE and FRANK J.
CARDINALE, Minors, by FRANCES CAR-
DINALE, Their Guardian Ad Litem,

Libelants,

VS.

UNION OIL COMPANY OF CALIFORNIA,
a corporation,

Respondent.

Appeal from the United States District Court
for the Northern District of California,
Southern Division, in Admiralty.

BRIEF FOR RESPONDENT.

STATEMENT OF THE CASE.

The essential facts of the case reveal an effort by counsel for Libelants-Appellants to belatedly attempt to have the time for filing an appeal to this Honorable Court extended under the obviously improper theory that their own dereliction in not filing a timely Notice of Appeal should be overlooked because of alleged clerical error and inadvertence on the part of the Trial Judge and the Clerk of the District Court.

On January 12, 1956, the Honorable Michael J. Roche, Chief Judge of the District Court, filed a Memorandum Opinion (T.R. 10-17) in which Opinion the evidence of the case was reviewed and the conclusions of the Court, both as to the facts and the law, are clearly set forth. It was ordered in the Opinion "That a decree be entered upon findings of fact and conclusions of law in favor of respondent, and against libelants." (T.R. 17.)

Proctors for the respondent, Union Oil Company, then—prepared formal Findings of Fact and Conclusions of Law in summary of the Trial Judge's own Memorandum Opinion. These Findings were properly served on Proctors for Libelants-Appellants by mail and the formal judgment on the Findings was signed and filed on January 30, 1956. (T.R. 23.)

Respective Stipulations ordered thereon allowed Proctors for Libelants-Appellants until February 29, 1956, to file objections to these Findings. (T.R. 30-31.)

These objections were filed on February 29, 1956. (T.R. 30.)

On March 14, 1956, oral arguments were heard by the Trial Judge, (T.R. 32) and on April 10, 1956, an Order was signed by the Trial Judge overruling the objections filed and disallowing the proposed counterfindings. (T.R. 32.)

Nothing further was done by Proctors for Libelants-Appellants until December 18, 1956,—*after a lapse of time of over eight months* from the Order disallowing the objections of February 29, 1956. Then on Decem-

ber 18, 1956, an ex parte application was made by Proctors for Respondents-Appellees for a *nunc pro tunc* order setting aside the Findings of Fact and Judgment.

This Motion was denied by the Trial Judge (T.R. 33) and on March 12, 1957, a Notice of Appeal was filed (T.R. 33) appealing from the Order of the Trial Judge in denying Libelant's Motion for Order *Nunc Pro Tunc*.

The transcript of the record does not contain any transcript of the evidence of the witnesses who testified at the trial and we are therefore not attempting to review the facts concerning the litigation between the parties.

SPECIFICATIONS OF ALLEGED ERRORS RELIED UPON BY APPELLANTS.

Only three specifications are set forth (page 4, Appellants' Brief) which are as follows:

1. The District Court erred in allowing the judgment to be entered on January 30, 1956.
2. The District Court erred in refusing to enter a written order in conformity with its oral order of March 14, 1956, thus depriving Libelants-Appellants of due process of law by jeopardizing Libelants' rights of appeal, without knowledge of Libelants.
3. The District Court erred in denying the Libelants' Motion to enter an Order *Nunc Pro Tunc* setting aside findings of fact, conclusions of law and judgment thereon.

APPELLANTS' ARGUMENT.

The Summary of Argument (Appellants' Brief, page 5), contains four points which may be properly condensed as follows:

1. The judgment was entered through clerical error and inadvertence and thus was not an act of judicial discretion and hence should not be allowed to stand.

2. The Judgment was a void Judgment because Appellants had no opportunity to enter Objections to the Judgment on the Findings.

3. The Trial Court had the duty to enter a written Order *Nunc Pro Tunc* because he permitted Appellants to file Objections and heard oral arguments thereon.

4. That the denial of the Motion *Nunc Pro Tunc* constitutes a deprivation of due process of law which jeopardized Appellants' rights of appeal without knowledge of the Appellants.

ARGUMENT.

We will now answer the argument of Appellants in the order set forth in their Brief.

I.

THE JUDGMENT WAS A FINAL JUDGMENT AND AN ACT OF JUDICIAL DISCRETION.

A number of decisions are set forth in Appellants' Brief to the effect that a Trial Judge has the power

to correct judgments entered through mistake or error. With this contention we are in accord.

The case of *Sabine Hardwood Co. v. West Lumber Co.*, 238 Fed. 611 (D.C. Tex. 1916) cited by Appellants well illustrates that right but has absolutely no relevancy to the case at bar. In the cited case the size or acreage of a parcel of land in litigation has been improperly described in the judgment entry through mutual mistake. That the Judge had the right to correct such mistake was the holding of the case.

Such is the effect of *Federal Rule* 60 (b).

We likewise do not see the relevancy of cases such as *Fox v. Smith*, 30 Fed. 2d 869 (C.C.A. D.C. 1929) cited by Appellants in which the Clerk, without authority, entered an order dismissing an action without prejudice and holding that such act was void.

We have carefully read each case cited by Proctors for Appellants all of which we find not to be factually even remotely close to the questions and issues raised in this Appeal and as heretofore stated we are in accord that a Trial Judge is given great powers both in law and in equity to amend, correct, augment or supplement his orders, judgments or findings.

We likewise recognize that a Clerk of any Court has certain acts to perform where he acts in a purely ministerial capacity and would in such instances not act in a judicial function.

We likewise know that a judge sitting on the Admiralty side of the Court has the right to correct and amend his orders, judgments or findings. (With certain limitations.)

We most respectfully disagree with Proctors for Appellants that the judgment entered in this case was one which had been entered through lack of judicial discretion or as the result of any clerical error or inadvertence.

As was pointed out in Appellants' Brief (page 10), the issue is one of the Judge's intent and the best evidence is the Judge's own statement, either expressed or implied, from his orders.

It seems clear to us that when the Trial Judge signed and filed his Opinion and the Findings that were drafted pursuant thereto followed by an Order on the Findings, that a Judgment had been properly and completely entered and carried out the full decision and intent of the judge to give judgment adverse to appellants.

Could the fact that the Court permitted Appellants to later file Objections, according them a hearing and then denied their Objections to the Findings that had been entered have the effect of leaving the formal entered judgment in a position to be called void? We think not.

Libelants-Appellants' entire appeal is based on an erroneous conception on their part that there was some type of clerical error involved in the signing of the Findings and the entry of judgment which permits their right of appeal to continue indefinitely.

Their interpretation of Rule 60, *Federal Rules of Civil Procedure* is that after the Court had disallowed and overruled their Objections to the Findings that

were signed and disallowed their proposed counter-findings, that a violation of Rule 60 had been committed which gave them an indefinite extension of rights of appeal for a period of over eight months when they filed the instant Notice of Appeal.

This Honorable Court in the case of *Perrin v. Aluminum Co. of America*, (C.C.A. 9, 1952), 197 Fed. 2d 254 in part said (p. 255):

“* * * Rule 60(b) was not intended to be resorted to as an alternative to review by appeal, nor as a means of enlarging by indirection the time for appeal except in compelling circumstances where justice requires that course. Cf. *Hill v. Hawes*, 320 U.S. 520, 64 S. Ct. 334, 88 L. Ed. 283. Appellants had opportunity to obtain appellate review of the very rulings of which they now complain but failed to take advantage of the opportunity within the time prescribed by rule 73(a). *Having in consequence of their own lack of diligence been turned away at the front door they now seek entry at the rear.* Certainly Rule 60(b) was not designed to afford machinery whereby an aggrieved party may circumvent the policy evidenced by the rule limiting the time for appeal.” (Added emphasis ours.)

The time for appeal from the judgment of January 30, 1956, was clearly extended by the Courts granting them permission to file their Objections and was suspended until the Order overruling their Objections was entered on April 10, 1956.

In the case of *McConville v. United States*, (C.C.A. 2, 1952), 197 Fed. 2d 680 the Court well stated the rule as follows (p. 682):

“We must first dispose of the plaintiff’s contention that the Government’s Appeal is too late. This is based on the fact that the latter’s notice of appeal was filed more than sixty days after the initial judgment of August 13, 1951, based on a memorandum and findings of that date. It was, however, well within the time if computable from the court’s order denying the timely motion to amend and add to the findings in several substantial particulars and to retax the costs and amend the judgment accordingly. Even under the older law, such a substantial motion would, it seems, have suspended the running of the time for appeal. *Leishman v. Associated Wholesale Electric Co.*, 318 U.S. 203, 63 S. Ct. 543, 87 L. Ed. 714. At any rate the question is no longer doubtful; for the Amendment to Fed. Rules Civ. Proc. rule 73(a), 28 U.S.C.A., effective March 19, 1948, while materially shortening the time for appeal, specifically excepted the time for consideration of a motion *inter alia*, to amend or make additional findings of fact under Fed. Rule 52(b).”

We therefore seriously doubt that there is even an appealable order before this Court.

McConville v. United States, (supra);

Steccone v. Morse-Starrett Products Co. (C.C.A. 9, 1951), 191 Fed. 2d 197.

The *Steccone* case is later in this Brief discussed.

II.

THE JUDGMENT ENTERED WAS A FINAL JUDGMENT.

Appellants cite a considerable number of cases concerning the effect of a Court entering judgment before the trial had been concluded, which cases we again respectfully submit have no bearing on the case at bar.

In *Golpin v. Page*, 18 Wall. 350, 21 L. Ed. 959 (1874) cited by Appellants concerned the lack of jurisdiction of the Court to enter a judgment against a non-resident minor defendant.

Pickering v. Palmer, 18 N.M. 473, 138 Pac. 198, concerned the efforts of a justice of the peace to have a trial before the summons to appear at the trial was returnable.

Moore v. Smith, 177 Va. 621, 155 Atl. 2d 48, likewise cited by Appellants concerned another effort by a justice of the peace to enter a judgment three days before the defendant had been summoned to appear.

Needless to say the cases properly held that the justice of the peace violated all well known rules of due process of law.

The case of *Schmidt v. Terry* (C.C. N.Y.), 111 Fed. 290 (1901) merely holds that where the trial judge ordered a stay or entry of judgment pending a motion for a new trial that the entry of judgment without an order denying the new trial was improper practice and should be vacated.

The cited case of *Lampel v. Goldstein*, 167 N.Y.S. 576 (1917) which appellants state in their brief to be

closely analogous to the instant case (Appellants' Brief, page 17) involved the efforts of a Municipal Judge to enter a judgment four days before the case was ready for submission and during a continuance of the actual trial.

We state that the Court did give Proctors for Appellants their day in Court, there was a complete trial, and full opportunity was accorded appellants to object to the findings which was carried out by written objections, written proposed counter findings and orally argued.

This Honorable Court held in the case of *Steccone v. Morse-Starrett Products Co.*, (C.C.A. 9, 1951), 191 Fed. 2d 197 that even a judgment entered without the requisite findings of fact was at most an erroneous judgment and not void. This Court further held in the *Steccone* case that the fact that the judgment was not submitted to appellant for approval before filing did not impair its effectiveness or finality and appealability.

The practice of Trial Judges signing findings of fact and conclusions of law before objections or counter findings have been lodged has been repeatedly held to be proper practice in the California Courts.

California Code of Civil Procedure, Section 634 provides as follows:

"In all cases where findings are to be made, a copy of the proposed findings shall be served upon all parties to the action and the Court shall not sign any findings thereon prior to the expiration of five days after such service. The Court may direct a party to prepare findings."

In the case of *Treat v. Superior Court* (1936) 7 Cal.2d 636, 62 Pac.2d 147, contentions concerning the signing of findings of fact before service of the same of plaintiff were disposed of by the California Supreme Court where it in part said (p. 638):

“Thereafter on June 25, 1935, said judge signed the findings of fact and conclusions of law and judgment * * *. Thereafter, on July 8, 1935, plaintiff served and filed notice of his intention to move for a new trial, and also a motion to vacate the judgment and findings of fact and conclusions of law upon the ground as set forth in the motion, that ‘no copy of said proposed Findings of Fact and Conclusions of Law were ever served upon or exhibited to the plaintiff or his counsel prior to June 28, 1935.’ On August 26th the motion to vacate the findings and judgment was heard by the late Thomas F. Graham who granted the motion to vacate the findings and judgment on the following minute order or entry was then made and entered into the records of said Court: ‘In this action, it is ordered by the Court that the Motion to vacate the findings and judgment be and the same is hereby granted. * * *’”

Page 639:

“* * * The sole questions, therefore, presented is whether or not the minute order complained of, as made and entered, was beyond the power of the trial court to make. * * * (After quoting Section 634 of California CCP the Court says) * * * However, this section has on numerous occasions been held to be merely directory and not mandatory * * * (citing cases) * * * and nowhere in the statutes is the failure of a party to serve the

opposite party with a copy of the proposed findings of fact and conclusions of law specified as a ground for setting aside or vacating a judgment.”

In accord:

Noland v. Noland (1941) 44 C.A.2d 780, 113 Pac. 2d 11;

Sandecoff v. Jackson (1920) 46 C.A. 256, 189 Pac. 111;

Peibler v. Seawell (1954) 122 C.A.2d 503, 265 Pac. 2d 109.

III.

THE REQUESTED ORDER NUNC PRO TUNC.

We feel that the California case of *Treat v. Superior Court*, supra, has fully answered all of the questions raised by Appellants adversely to their position. That case clearly holds that even if a minute entry attempting to set aside the judgment and findings had been entered by the trial Court it would not have been a valid order.

There must be a judgment and there must be findings. The trial Court had the power to permit appellants' proctors to argue their objections, this he did. The trial judge had the power to grant amendments to the findings or to even substitute an entire new set of findings, this he refused to do.

What order nunc pro tunc was to be entered in this case? Proctors for appellants appeared on December

18, 1956, long after their rights of appeal had expired and asked for an order nunc pro tunc for the sole and obvious purpose of trying to get an unwarranted and unauthorized extension of time in which to file a notice of appeal.

There was no record requiring correction, despite arguments of appellants' proctors. There was a valid judgment complete with findings, all of which could have been appealed from.

What was the need for the order nunc pro tunc? It was merely and obviously an attempt to get around the appellants' lapsed time of appeal.

The case of *In re Wight*, 134 U.S. 136, 10 S. Ct. 487, 33 L. Ed. 865, cited by appellants (Appellants' Brief, p. 19) concerns a writ of habeas corpus in an embezzlement case and we have carefully read the case and fail to see the relevancy to the case at bar.

The term "nunc pro tunc" has been defined and its uses illustrated in Volume 6 *Moore's Federal Practice* (1953 edition) pages 3537 et seq. as follows:

"The Latin phrase 'nunc pro tunc' translated literally means 'now for then'. In reference to the rendition of a judgment or the ministerial act of entry, nunc pro tunc signifies that there is a relation back to a designated past date and that the judgment and/or entry are to be given certain anterior effects. * * *

Cases involving an entry of judgment nunc pro tunc generally break down into two groups: (1) those in which one of the parties died after the submission of the case to the lower court for his decision, but before the actual rendition of the

judgment; and (2) those in which a judgment has in fact been rendered by the lower court but the Clerk has failed to perform the ministerial function of entry.

The first group of cases is by far the most numerous. And an entry of judgment *nunc pro tunc* in such case is generally desirable as a means of relieving litigants from undue harm consumed in judicial deliberation. In the second class of cases, the *nunc pro tunc* technique has been employed when a party has erroneously assumed that a judgment has been entered, and has consequently appealed from the unentered judgment. To protect the appellant against the Clerk's neglect, the Appellate Court may find that justice would be served by an entry *nunc pro tunc* of the judgment appealed from, as of the date that the entry should have been made. This is not invariably done, however, and then the appeal is dismissed as premature—oftentimes a wasted policy.”

In the light of the fact that appellants have obviously failed to point out any facts or circumstances which would require the granting of the order *nunc pro tunc* we will not further argue the point.

IV.

APPELLANTS WERE NOT JEOPARDIZED IN THEIR APPEAL RIGHTS BY THE DENIAL OF THE MOTION NUNC PRO TUNC.

As we have heretofore pointed out in our discussion of the case of *McConville v. United States* (supra), the appellants had ample and generous time in which to file a Notice of Appeal from the judgment entered in this case.

They preferred however to wait for over eight months after the Court had ruled adversely to them on their objections to the findings and overruled their counter findings to file an ex parte motion for an order nunc pro tunc.

The use of the *Federal Rule 60* as a medium for entering the back door of appeal instead of the front door is well considered in the case of *Perrin v. Aluminum Co. of America* (supra), which we have previously discussed and quoted from.

Proctors for appellants have devoted several pages of their brief (Appellants' Brief, pages 22-28) in contending that the findings of fact did not conform to the evidence.

In reply to that contention we point out that (1) such contention was not raised in the Specifications of Errors Relied On (Appellants' Brief, page 47), (2) that no transcript of the evidence has been prepared or filed in this appeal and (3) that the findings of fact are factually true and correctly have stated the findings of the trial Court on the entire evidence introduced in the trial of the case.

We also believe that the questions concerning conflicting evidence and the weight of the evidence are not involved in this appeal, which is directed primarily to the refusal of the trial judge to enter the order nunc pro tunc.

CONCLUSIONS.

For the many reasons and the cases cited by us in this brief, we respectfully contend:

1. That the refusal of the trial judge to enter the order nunc pro tunc was a valid exercise of the Court's discretion.
2. That such refusal is not an appealable order.
3. That a valid judgment and valid findings had been properly entered and filed in this action.
4. That the time for appeal has expired and was not caused by any impropriety of the Court or Clerk.
5. That the appeal should be dismissed.

Dated, San Francisco, California,

August 15, 1957.

Respectfully submitted,

FREDERIC G. NAVE,

BOYD & TAYLOR,

Proctors for Respondent.

No. 15,492

United States Court of Appeals
For the Ninth Circuit

FRANCES CARDINALE, ANN F. CARDINALE,
HORACE A. CARDINALE and FRANK J.
CARDINALE, Minors, by Frances Car-
dinale, Their Guardian Ad Litem,

Libelants,

VS.

UNION OIL COMPANY OF CALIFORNIA, a
corporation,

Respondent.

Appeal from the United States District Court
for the Northern District of California,
Southern Division, in Admiralty.

CLOSING BRIEF FOR LIBELANTS-APPELLANTS.

MORGAN & BEAUZAY,

28 North First Street,
San Jose 13, California,

MORTON L. SILVERS,

870 Market Street,
San Francisco 2, California,

Proctors for Libelants-Appellants.

FILED

SEP 20 1957

PAUL C. ...

CLERK



Subject Index

	Page
Introduction	1
Respondent's statement of the case	2
Respondent's statement of appellants' argument	3
Rebuttal argument	4
I. The trial court had no opportunity to exercise judicial discretion, as is clearly shown by his orders granting added time to object to the proposed findings	4
II. It was not within the power of the trial court to enter judgment adverse to a party not before the court ...	9
III. The trial court should have granted the requested order nunc pro tunc in conformity with the earlier oral order	12
IV. Appellants were jeopardized in their rights of appeal by denial of the motion nunc pro tunc, since that was the only remedy available to appellants	14
Conclusion	17

Table of Authorities Cited

Cases	Pages
Fox v. Smith (C.C.A., D.C., 1929), 30 Fed. 2d 869	7
Gregory v. Stetson, 133 U.S. 579, 10 S.Ct. 422, 33 L.Ed. 792	10
In re Wight, 134 U.S. 136, 10 S.Ct. 487, 33 L.Ed. 865	13, 15
McConville v. United States (C.C.A. 2, 1952), 197 Fed. 2d 680	8, 9
Perrin v. Aluminum Co. of America (C.C.A. 9, 1952), 197 Fed. 2d 254	8
Roth v. Marsten, 110 Cal. App. 2d 249, 242 Pac. 2d 375 . . .	14
Sabine Hardwood Co. v. West Lumber Co. (D.C., Tex., 1916), 238 Fed. 611	7
Steecone v. Morse-Starrett Products Co. (C.C.A. 9, 1951), 191 Fed. 2d 197	10, 11
Treat v. Superior Court (1936), 7 Cal. 2d 636, 62 Pac. 2d 147	11, 12

Codes

California Code of Civil Procedure, Section 634	11
---	----

Rules

Federal Rules of Civil Procedure:	
Rule 52(b)	9
Rule 60	8
Rule 60(b)	8
Rule 73(a)	9

Texts

Moore's Federal Practice, Volume 6	14
--	----

No. 15,492

United States Court of Appeals For the Ninth Circuit

FRANCES CARDINALE, ANN F. CARDINALE,
HORACE A. CARDINALE and FRANK J.
CARDINALE, Minors, by Frances Car-
dinale, Their Guardian Ad Litem,

Libelants,

vs.

UNION OIL COMPANY OF CALIFORNIA, a
corporation,

Respondent.

Appeal from the United States District Court
for the Northern District of California,
Southern Division, in Admiralty.

CLOSING BRIEF FOR LIBELANTS-APPELLANTS.

INTRODUCTION.

As was stated in appellants' opening brief, this appeal is concerned with the District Court's entry of Judgment on Findings of Fact and Conclusions of Law, at a time when appellants were relying on orders of the Court extending the time of appellants to file objections to the proposed Findings and Conclusions. In this closing brief, we will confine ourselves to answering the legal arguments advanced by respondent

in opposition to the legal position taken in our opening brief. It would seem inappropriate to reply to respondent's repeated innuendoes and statements that the requested order *nunc pro tunc* "was merely and obviously an attempt to get around the appellants' lapsed time of appeal." That is a personalized impugning of motive and is not in any sense a legal argument addressed to issues presented in this appeal.

RESPONDENT'S STATEMENT OF THE CASE.

Appellants are not in agreement with the statement of the case set out in respondent's brief, where it is said that proctors for the respondent "prepared formal findings of fact and conclusions of law in summary of the trial judge's own memorandum opinion." We desire to emphasize that the so-called "findings of fact and conclusions of law" were, in fact, *proposed* findings and conclusions. The essence of our appeal is that the District Court acted improperly in entering judgment on the *proposed* findings and conclusions, before appellants were given the opportunity to be heard in objection thereto.

Their status as *proposed* findings and conclusions is clearly shown by the orders entered by the District Court on January 19, 1956, and February 14, 1956 (T.R., pp. 30, 31).

We think it somewhat bold to state that respondent's proposed findings and conclusions were "in summary of the trial judge's own memorandum opinion."

At pages 22 and 23 of appellants' opening brief, we have set out portions from the transcript of record which clearly establish that the proposed findings of respondent did not accurately and completely summarize the trial judge's memorandum opinion.

More importantly, the respondent's statement of facts omits to state that on March 14, 1956, the District Court entered an oral order setting aside the findings of fact and judgment (T.R. pp. 35, 36; appellants' opening brief, pp. 18-19). Respondent appears to have assumed, throughout its brief, that no such order was ever made by the trial Court. The failure of the trial Court to give full effect to its order setting aside the findings and judgment constituted a major point in the brief of appellants. As a consequence of its assumption, respondent appears to have made no effort to meet major points of the argument advanced by appellants.

**RESPONDENT'S STATEMENT OF
APPELLANTS' ARGUMENT.**

At page 4 of their brief, respondent has "properly condensed" the summary of argument advanced by appellants. Just as any litigant, appellants prefer to summarize our own argument in our own manner. We feel that unwarranted mis-statements of our argument have been set out in respondent's condensation. We specifically object to points II and III of respondent's re-statement of our argument. Respondent construes point II of our argument as being that the judgment

was void because “appellants had no opportunity to enter objections to the *judgment on the findings*.” More precisely, this point of our argument was that the judgment was void because appellants had no opportunity to enter objections to the *proposed findings* on which the judgment was based.

Respondent gratuitously rephrased the third point of our argument as being that the trial Court had the duty to enter a written order nunc pro tunc “because he permitted appellants to file objections and heard oral arguments thereon.” This, again, appears to be assuming away the entire argument, and constitutes an utter failure to meet our argument. More precisely, point III of our argument could be restated as that the trial Court had the duty to enter a written order nunc pro tunc *because he entered an oral order setting aside the judgment*, which order was never entered on the Record in written form.

REBUTTAL ARGUMENT.

We will now rebut the argument advanced by respondent in the order set forth in its brief.

I. THE TRIAL COURT HAD NO OPPORTUNITY TO EXERCISE JUDICIAL DISCRETION, AS IS CLEARLY SHOWN BY HIS ORDERS GRANTING ADDED TIME TO OBJECT TO THE PROPOSED FINDINGS.

Respondent’s brief (pp. 4-5) concedes that a trial judge has the power to correct judgments entered

through mistake or error. Respondent has omitted to discuss the authorities cited by appellants for the proposition that clerical error may be committed by a judge, as well as by a clerk; it is assumed that they are also in accord on this point. Respondent also has failed to answer the proposition that a judgment entered by a clerk without authority is void; it is assumed that they are likewise in accord with this proposition.

Respondent does disagree with appellants' position that the judgment herein was entered through clerical error and inadvertence, and with a lack of judicial discretion. As to this phase of the appeal, the crux of the matter appears to be whether or not there was an exercise of judicial discretion in the entering of the judgment on January 30, 1956.

At page 10 of appellants' opening brief, it was stated that the issue is one of the judge's intent, and that the best evidence is the judge's own statement. Proctors for respondent appear to have misread this quotation, for they say (p. 6) that the judge's statement is "either expressed or implied, *from his orders.*" The quoted matter, set out in appellants' opening brief, reads as follows: "... either expressed or implied *from the order of correction.*"

It was pointed out in appellants' opening brief that there is, in this case, no order of correction from which the judge's intent can be gathered. We argued that his intent had been clearly manifested in his granting of the orders of continuance.

In opposition to that argument, respondent's brief states only that the trial judge's intent to give judgment adverse to appellants was made clear by the entry of judgment. Respondent thus seems to have completely ignored the first point of the argument advanced by appellants herein—that the judgment was entered through clerical error and inadvertence, and without the exercise of judicial discretion.

Appellants submit that it *was* the intent of the trial judge to give *judgment* adverse to appellants; this is made clear by his memorandum opinion (T.R. 10). It is earnestly submitted that it is equally clear that it was *not* the trial judge's intent to enter judgment *on the proposed findings* of fact and conclusions of law submitted by respondent.

The attention of this Court is again respectfully directed to the orders of January 19, 1956, and February 14, 1956, wherein the trial Court extended the time of libelants-appellants "within which to file objections to the proposed findings of fact and conclusions of law submitted by respondents."

We can do no more than reiterate what was said at page 7 of appellants' opening brief, wherein we pointed out that the sole apparent purpose in the mind of the Court in granting continuances to enable the entering of objections necessarily must have been to enable the Court to have the benefit of opposing points of view in the exercise of a sound judicial discretion to reach a final determination on the issues. It will be perfectly obvious to this Honorable Court that the entry of such orders would have been a futile act had

it been the intent of the trial judge to enter judgment on the findings proposed by respondent.

Respondent's brief asserts that some of the cases cited by proctors for appellants were found "not to be factually even remotely close to the questions and issues raised in this appeal." We think it a novel view that appellants are required to cite cases which are factually similar. Each and every case cited in appellants' opening brief was cited for a proposition of law. Each and every such proposition of law is very relevant to the case at bar.

Respondent concedes that the case of *Sabine Hardwood Co. v. West Lumber Co.* (D.C., Tex., 1916), 238 Fed. 611, well illustrates the power of the trial judge to correct judgments entered through mistake or error. As was pointed out by respondent, the case held there was a power in the trial judge to correct a mistaken description in the judgment. Inasmuch as such power is conceded to exist, we see no basis for their position that the trial judge does not equally have the power to set aside an entire judgment which was entered through mistake or inadvertence. In the cited case, it was said:

"But if [the clerk] makes a mistake in the entry, can it be said that the judicial act of the court can be controlled by the ministerial act and mistake of the clerk? Certainly not!"

The relevancy of *Fox v. Smith* (C.C.A., D.C., 1929), 30 Fed. 2d 869, has been made clear by the portions quoted on page 11 of appellants' opening brief.

The balance of respondent's first point is devoted to a discussion of Rule 60, Federal Rules of Civil Procedure, and cases construing that Rule. As was pointed out in appellants' opening brief (p. 10), those rules are not binding in admiralty cases. Even if it should be assumed that such rules are binding, the cases cited by respondent are readily distinguishable.

In the case of *Perrin v. Aluminum Co. of America* (C.C.A. 9, 1952), 197 Fed. 2d 254, it was held that Rule 60(b) was not intended to be resorted to as a means of enlarging by indirection the time for appeal *except in compelling circumstances where justice requires that course*. In the case before this Honorable Court, the appeal is from the entry of judgment which was, obviously and patently, inadvertent, premature, and through mistake. Such was not the case in *Perrin v. Aluminum Co. of America*, supra. The Court said (p. 255):

“[Appellants] have not shown, nor do they claim, that there has been any mistake, inadvertence, surprise, excusable neglect, newly discovered evidence, fraud or misconduct such as might warrant the vacation of a judgment under other provisions of the rule.”

Respondent cites *McConville v. United States* (C.C.A. 2, 1952), 197 Fed. 2d 680, in support of its theory that the time granted to appellants herein was somehow extended by the orders of the trial Court granting permission to file objections to the proposed findings of fact and conclusions of law. The case is one construing the Federal Rules of Civil Procedure.

Even if it should be, again, assumed that such rules are binding in admiralty cases, it is respectfully submitted that the differences between the instant case and the *McConville* case are so extensive as to render the principle of the *McConville* case inapplicable here.

Rule 73(a), construed in the *McConville* case, provides in part as follows:

“The running of the time for appeal is terminated by a timely motion made pursuant to any of the rules hereinafter enumerated, and the full time for appeal fixed in this subdivision commences to run and it is to be computed from the entry of any of the following orders made upon a timely motion under such rules: * * * or granting or denying a motion under Rule 52(b) to amend or make additional findings of fact, * * *”

Rule 52(b), in turn, provides that the Court may *amend* its findings upon motion of a party made not later than ten days after entry of judgment. It will be readily apparent to this Honorable Court that what was contemplated by the terms of this section is a situation vastly different from the situation in the instant case, where the trial Court granted its order continuing the time of libelants to enter objections to *proposed* findings of fact and conclusions of law.

II. IT WAS NOT WITHIN THE POWER OF THE TRIAL COURT TO ENTER JUDGMENT ADVERSE TO A PARTY NOT BEFORE THE COURT.

Respondent commences point two of its argument by pointing out that some of the cases cited in appel-

lants' opening brief were not *factually identical* with the case at bar. Once again, we point out that those cases were cited, not for their factual situations, but for principles of law. The gist of those cases was that when a party is not before the Court, the entry of judgment against such party would be an act in excess of the Court's jurisdiction. The attention of this Honorable Court is respectfully directed to page 16 of appellants' opening brief, where it was argued that appellants were entitled to rely upon the orders of the trial Court extending their time to submit proposed counter-findings and that the judgment entered prior to the expiration of such time was prematurely entered.

In any event, respondent has not sought to refute the clear holding of *Gregory v. Stetson*, 133 U.S. 579, 10 S.Ct. 422, 33 L.Ed. 792 (p. 14, appellants' opening brief) that a Circuit Court can make no decree in a suit in the absence of a party whose rights must necessarily be affected thereby. There can be no question but that appellants, in reliance on the orders extending their time to enter objections to the proposed findings of fact and conclusions of law, were not before the Court on January 30, 1956, the date upon which judgment was entered.

In the case of *Steccone v. Morse-Starrett Products Co.* (C.C.A. 9, 1951), 191 Fed. 2d 197, the question before this Honorable Court was whether or not a memorandum opinion, unsupported by findings of fact and conclusions of law, constituted a final judgment from which an appeal would lie. It was held that "the

absence of requisite findings of fact is not such a jurisdictional defect as would prevent an appeal.”

It would seem almost unnecessary to point out to this Honorable Court that the *Steccone* case involved the complete absence of findings and conclusions, while the instant case involves a judgment made on findings which had been proposed by the respondent herein and to which libelants had no opportunity to object.

Respondent concludes that portion of his argument by quoting Section 634 of the California Code of Civil Procedure, and California cases construing that section. It is respectfully submitted that the entire argument there advanced relates solely to California procedure, and thus is not controlling as to this Court.

Even if it should be assumed that Section 634 of the California Code of Civil Procedure, and the case of *Treat v. Superior Court* (1936), 7 Cal. 2d 636, 62 Pac. 2d 147, were controlling, it is respectfully submitted that the identical relief herein prayed for would be granted to appellants under those rules.

Respondent's brief (pp. 11-12) quotes portions from *Treat v. Superior Court*, supra, purporting to show that a judgment is valid, despite the lack of service of findings of fact and conclusions of law on the opposing party. The attention of this Honorable Court is respectfully directed to the fact that, in the portion quoted in respondent's brief, the Court relied solely on *statutory* authority.

However, in the portion immediately following that quoted in respondent's brief, the holding of the Cali-

Respondent's brief next sets out language from Volume 6 of *Moore's Federal Practice*, purporting to show the uses of nunc pro tunc entries. Inasmuch as that discussion relates to the nunc pro tunc entry of *judgments*, no necessity is seen for our discussing the point. The instant appeal involves the propriety or necessity of entry of an *order* nunc pro tunc.

Respondent's brief apparently has not sought to controvert the rule announced in *Roth v. Marsten*, 110 Cal. App. 2d 249, 242 Pac. 2d 375, to the effect that a court has the plain duty to remedy clerical errors. It is respectfully submitted that the trial Court had not only the power, but also the duty to allow the motion for entry nunc pro tunc of the order setting aside the judgment.

IV. APPELLANTS WERE JEOPARDIZED IN THEIR RIGHTS OF APPEAL BY DENIAL OF THE MOTION NUNC PRO TUNC, SINCE THAT WAS THE ONLY REMEDY AVAILABLE TO APPELLANTS.

The brief for respondent (p. 15) states that "the appellants had ample and generous time in which to file a notice of appeal from the judgment entered in this case." Respondent has not seen fit to enlighten us as to how such an opinion was arrived at.

It is fundamental that an appeal lies to this Honorable Court only from a final judgment or a final determination of the rights of a party. Surely it cannot be said that libelants herein could take a direct appeal from the judgment entered on January 30, *after* the

Court had set aside such findings of fact and judgment. Subsequent to the entry of the trial Court's order setting aside the findings of fact and judgment, there was no judgment of record from which a direct appeal could be had.

At the very least, appellants were compelled to wait until after a judgment had been entered before appeal proceedings could be commenced.

The only remedy then available to libelants-appellants herein was to move for entry of a written order in conformity with the oral order made on March 14, 1956, to make the record speak the truth. It is obvious that appellants were compelled to wait for some time subsequent to March 14, 1956, before appellants became aware that the trial Court had no intention to enter such written order. Thus, a *nunc pro tunc* entry was the only remedy available to appellants.

The instant case is similar to the case of *In re Wight*, supra, in that the written journal of the Court did not fully and completely reflect the orders of the Court. It is respectfully submitted that, just as was done in that case, so here the trial Court's written record should have been corrected by an order *nunc pro tunc* to properly show the orders made by the Court.

Respondent's brief (p. 15) next asserts that appellants' opening brief, at pp. 22-28, is devoted to our contention that the findings of fact did not conform to the *evidence*. Reference to p. 22 of appellants' opening brief discloses that the first point there discussed

is that the findings of fact did not conform with the trial Court's *memorandum opinion*. In a similar manner, the second point there discussed does not constitute a contention that the findings of fact did not conform to the evidence. On this point, we argued that the trial Court should have entered a finding as to the duty of a gasoline attendant to exercise care so as not to cause the gasoline to overflow—a question of law.

The remaining points made in that portion of our opening brief (with regard to custom in refueling, rate of flow of gasoline, and point of origin of the fire) were not a contention on the part of appellants that the findings of fact did not correspond to the evidence. Rather, that discussion shows that the trial Court refused to make any such changes in the proposed findings which had theretofore been adopted inadvertently.

It has not been our intent to raise any questions as to weight of the evidence on this appeal. We do maintain that all of those issues should have been considered by the trial Court in the exercise of a sound judicial discretion.

Respondent's brief concludes by stating that this appeal "is directed primarily to the refusal of the trial judge to enter the order *nunc pro tunc*." This constitutes a failure to recognize that the appeal is equally directed to the question that the entry of judgment was error, for the reason that appellants were not before the Court at the time of such entry, having obtained from the Court its orders extending time within which to object to the proposed findings.

CONCLUSION.

For the above stated reasons, and upon the basis of the authorities hereinabove cited, the appellants respectfully pray that this Honorable Court will reverse the trial Court, and order the entry of the order nunc pro tunc as sought by appellants in the Court below.

Dated, San Jose, California,
September 16, 1957.

Respectfully submitted,
MORGAN & BEAUZAY,
MORTON L. SILVERS,
By LUTHER CLARK,
*Proctors for Libelants-
Appellants.*

The first of these is the fact that the
government has been unable to
obtain the necessary funds to
carry out its policy. This is due to
the fact that the government has
been unable to raise the necessary
funds from the public. This is due to
the fact that the government has
been unable to raise the necessary
funds from the public.

The second of these is the fact that the
government has been unable to
obtain the necessary funds to
carry out its policy. This is due to
the fact that the government has
been unable to raise the necessary
funds from the public. This is due to
the fact that the government has
been unable to raise the necessary
funds from the public.

The third of these is the fact that the
government has been unable to
obtain the necessary funds to
carry out its policy. This is due to
the fact that the government has
been unable to raise the necessary
funds from the public. This is due to
the fact that the government has
been unable to raise the necessary
funds from the public.

The fourth of these is the fact that the
government has been unable to
obtain the necessary funds to
carry out its policy. This is due to
the fact that the government has
been unable to raise the necessary
funds from the public. This is due to
the fact that the government has
been unable to raise the necessary
funds from the public.

The fifth of these is the fact that the
government has been unable to
obtain the necessary funds to
carry out its policy. This is due to
the fact that the government has
been unable to raise the necessary
funds from the public. This is due to
the fact that the government has
been unable to raise the necessary
funds from the public.

No. 15,496

IN THE

United States Court of Appeals
For the Ninth Circuit

WALTER HOWARD THOMAS,

Appellant,

VS.

UNITED STATES OF AMERICA,

Appellee.

On Appeal from the United States District Court
for the Northern District of California.

BRIEF FOR THE UNITED STATES.

LLOYD H. BURKE,

United States Attorney,

JAMES B. SCHNAKE,

Assistant United States Attorney,

422 Post Office Building,

Seventh and Mission Streets,

San Francisco 1, California,

Attorneys for Appellee.

FILED

JUL 15 1957

PAUL P. O'BRIEN, CLERK



Subject Index

	Page
Jurisdiction	1
Statement of the case	1
Opinion below	2
Questions presented	4
Argument	5
I. Count 25 of the indictment charged an offense separate and distinct from any of the offenses charged in the first 12 counts of the indictment	5
II. The sentence on Count 25 was consecutive to the sen- tence on Counts 1 through 12	7
III. The District Court did not err in declining to rule on the merits of appellant's contention that the charges in Counts 13 through 24 were merged into the charges in Counts 1 through 12	8
Conclusion	9

Table of Authorities Cited

Cases	Pages
Bloch v. United States, 261 Fed. 321 (5th Cir. 1919), cert. denied 253 U.S. 484	6
Carpenter v. Hudspeth, 112 F.2d 126 (10th Cir. 1940) ...	6
Carrol v. United States, 174 F. 2d 412 (6th Cir. 1949), cert. denied 338 U.S. 874	6
Carroll v. Sanford, 167 F. 2d 878 (5th Cir. 1948)	6
Chin Bick Wah v. United States (9th Cir. May 28, 1957)	7
Goldbaum v. United States, 204 Fed. 74 (9th Cir. 1953), cert. denied 346 U.S. 831	7
Kimball v. United States, 128 F. 2d 736 (5th Cir. 1942) ...	6
Lewis v. Hudspeth, 103 F. 2d 23 (10th Cir. 1939)	6
United States v. Cordo, 186 F. 2d 144 (2d Cir. 1951), cert. denied 340 U.S. 952	6
United States v. Dolasco, 184 F. 2d 746 (3d Cir. 1950) ...	6
United States v. Dunbar, 149 F. 2d 151 (7th Cir. 1945), cert. denied 325 U.S. 889	6

Statutes

18 U.S.C. Section 641	1, 6, 7
18 U.S.C. Section 659	6
28 U.S.C. Section 2255	1, 2

Rules

Federal Rules of Criminal Procedure, Rule 35	2
--	---

No. 15,496

IN THE

**United States Court of Appeals
For the Ninth Circuit**

WALTER HOWARD THOMAS,

Appellant,

VS.

UNITED STATES OF AMERICA,

Appellee.

On Appeal from the United States District Court
for the Northern District of California.

BRIEF FOR THE UNITED STATES.

JURISDICTION.

Jurisdiction is invoked under Section 2255 of Title
28 United States Code.

STATEMENT OF THE CASE.

Appellant is serving a 20-year sentence in the United States Penitentiary at Alcatraz Island, California. On February 16, 1955, an indictment was returned against appellant charging 25 counts of violations of 18 U.S.C. Section 641. Counts 1 through 12 charged appellant with theft of Government property; Counts

13 through 24 charged appellant with sale of Government property, and Count 25 charged appellant with concealment of stolen property. After a jury trial, appellant was sentenced to concurrent and consecutive terms of imprisonment totalling 20 years. A timely appeal was taken from the judgment of conviction. Motions for leave to appeal in forma pauperis were denied by the District Court and the Court of Appeals. On May 25, 1955, appellant filed a motion for new trial and to vacate sentence, which motions were denied by the District Court on June 17, 1955. On October 14, 1955, the appeal from the original judgment was dismissed by the Court of Appeals for failure to prosecute.

On April 24, 1956, appellant filed a motion to vacate sentence which was denied by the District Court on April 30, 1956. Thomas appealed from the order of denial, but the Court of Appeals denied his motion to prosecute the appeal on typewritten transcript of record and briefs on the ground that no justiciable question was presented, and the appeal was dismissed for failure to prosecute on December 20, 1956.

On January 18, 1957, Thomas filed a motion to correct sentence, which was denied by the District Court. The present appeal is from the order of denial.

OPINION BELOW.

Thomas has moved, pursuant to 28 U.S.C. 2255 and Rule 35 of the Federal Rules of Criminal Procedure, for correction of the sentence of twenty years' im-

prisonment imposed upon him herein on March 15, 1956. The charges upon which Thomas was convicted were contained in a twenty-five count indictment. The first twelve counts charged him with stealing and converting to his own use certain quantities of lead belonging to the United States. Counts thirteen through twenty-four charged him with unlawfully selling these quantities of lead. Count twenty-five charged him with unlawfully concealing with intent to convert to his own use other lead belonging to the United States. The Court sentenced him to ten years' imprisonment on each of the first twelve counts, the terms to run concurrently. A ten-year term of imprisonment was imposed on count thirteen to commence after the expiration of the term of imprisonment imposed on count one. Ten-year terms were imposed on each of counts fourteen through twenty-five, such terms to run concurrently with the term imposed on count thirteen, and with each other.

Thomas is presently serving the ten-year term imposed on counts one through twelve. He contends that counts thirteen through twenty-four will not support an additional sentence of ten years' imprisonment because they charge the same offense charged in the first twelve counts. The unlawful sale charged in counts thirteen through twenty-four, he argues, is but a part of and continuation of the conversion charged in the first twelve counts.

Assuming that the Court has jurisdiction at this time to entertain a motion to correct the sentence on counts thirteen through twenty-four, it is not neces-

sary to determine the question tendered. There is no doubt that count twenty-five charges an offense separate and distinct from any of the offenses charged in the first twelve counts. Although the judgment fixes the time for commencement of the term imposed on count twenty-five by stating that it shall run concurrently with the term imposed on count thirteen, it is perfectly clear that the Court intended the term imposed on count twenty-five to commence upon the expiration of the term imposed on the first twelve counts. Thus the total sentence of twenty years' imprisonment is a valid one whether or not counts thirteen through twenty-four support a sentence consecutive to the sentence imposed on counts one through twelve.

The motion to correct sentence is therefore denied.

QUESTIONS PRESENTED.

Appellant urges in his brief that the following questions are presented:

1. Did the District Court err in holding that Count 25 of the indictment charged an offense separate and distinct from any of the offenses charged in the first 12 counts of the indictment?
2. Did the District Court err in holding that the sentence on Count 25 was imposed consecutively to the sentence imposed on Counts 1 through 12?
3. Did the District Court err in not ruling on the merits of appellant's allegation that the charges con-

tained in Counts 13 through 24 were merged into the charges contained in Counts 1 through 12 and would not support consecutive sentences?

ARGUMENT.

I.

COUNT 25 OF THE INDICTMENT CHARGED AN OFFENSE SEPARATE AND DISTINCT FROM ANY OF THE OFFENSES CHARGED IN THE FIRST 12 COUNTS OF THE INDICTMENT.

The first 12 counts of the indictment charged appellant with theft of quantities of lead belonging to the United States on or about the first day of 12 successive months commencing December, 1953, and ending November, 1954. The 25th count of the indictment charged Thomas with the concealment and retention of stolen Government lead on December 15, 1954. It is clear from the face of the indictment that the concealment and retention, which occurred more than a year after the first theft and 44 days after the last theft charged, constituted an offense entirely separate and distinct from any of the offenses charged in the first 12 counts. The lead referred to in the 25th count is obviously not the same property as that referred to in any other count in the indictment.

Even if it were assumed that Thomas did steal the lead referred to in the 25th count (with which theft he was not charged), there would be nothing improper about consecutive sentences for the theft on the one hand and the concealment and retention on the other. On September 1, 1948, Congress amended Section 641,

deleting the requirement that the property be stolen "by any other person" for a charge of concealing and retaining stolen Government property. Thus the thief himself may be charged with concealment or retention of stolen property under Section 641, just as he may be charged with possession of property stolen by himself under Section 659, relating to interstate shipments. *United States v. Cordo*, 186 F. 2d 144 (2d Cir. 1951), cert. denied 340 U.S. 952; *United States v. Dolasco*, 184 F. 2d 746 (3d Cir. 1950); *Carroll v. Sanford*, 167 F. 2d 878 (5th Cir. 1948); *Bloch v. United States*, 261 Fed. 321 (5th Cir. 1919), cert. denied 253 U.S. 484; *Carrol v. United States*, 174 F. 2d 412 (6th Cir. 1949), cert. denied 338 U.S. 874; *United States v. Dunbar*, 149 F. 2d 151 (7th Cir. 1945), cert. denied 325 U.S. 889; *Carpenter v. Hudspeth*, 112 F. 2d 126 (10th Cir. 1940).

It has also been held proper to impose consecutive sentences on one charge of robbing a mail carrier of mail matter and another charge of receiving, concealing, and retaining the same mail matter. *Kimball v. United States*, 128 F. 2d 736 (5th Cir. 1942).

For a holding to the effect that retention of stolen property under Section 641 is a separate offense apart from other offenses, see *Lewis v. Hudspeth*, 103 F. 2d 23 (10th Cir. 1939).

The Federal cases cited by appellant to bolster his argument that the offense charged in Count 25 was a "restatement" of the offenses charged in Counts 1 to 12, do not support that proposition. The cases

cited referred to entirely different matters, such as the receiving and sale of counterfeit money, the theft of separate pieces of mail matter, continuous embezzlements over a period of time, and single transactions in violation of the Mann Act. The New York state case cited by appellant on the question of the liability of the thief for concealment or withholding of stolen property is clearly distinguishable since the decision is based entirely upon the construction of two state statutes entirely different from Section 641.

II.

THE SENTENCE ON COUNT 25 WAS CONSECUTIVE TO THE SENTENCE ON COUNTS 1 THROUGH 12.

Appellant has urged that the trial court did not impose a sentence on Count 25 consecutive to that imposed under Counts 1 through 12. Apparently Thomas attempts to fashion his argument from a twisted interpretation of the Court's language in imposing judgment. The judgment provides for a 10-year term on the first count; 10-year terms on Counts 2 through 12, concurrent with the term on Count 1; a 10-year term on Count 13, to be served after the expiration of the terms on Counts 1 through 12; and 10-year terms on Counts 14 through 25, to be served concurrently with the term on Count 13. The form of the judgment raises no problem of interpretation; it is simply a matter of reading the plain meaning of words to see that the term under Count 25 is to be

served upon the expiration of the terms under Counts 1 through 12.

III.

THE DISTRICT COURT DID NOT ERR IN DECLINING TO RULE ON THE MERITS OF APPELLANT'S CONTENTION THAT THE CHARGES IN COUNTS 13 THROUGH 24 WERE MERGED INTO THE CHARGES IN COUNTS 1 THROUGH 12.

Since the term of imprisonment imposed on Count 25 was concurrent with the terms of imprisonment on Counts 13 through 24, it was immaterial whether or not the conviction on Counts 13 through 24 would support a sentence consecutive to the sentence imposed on Counts 1 through 12. *Chin Bick Wah v. United States* (9th Cir. May 28, 1957); *Goldbaum v. United States*, 204 Fed. 74 (9th Cir. 1953), cert. denied 346 U.S. 831.

Appellant's contention that the District Court should have passed on the merits of his arguments as to Counts 12 through 24 (the sale of Government property counts), does raise a point which is material to the present appeal. The District Court could have ruled and this Court might well choose to rule that appellant's motion to correct sentence was defective on another ground. The motion to correct sentence was based upon the argument that the offense charged in Count 13 was identical with that charged in Count 1, the offense charged in Count 14 was identical with that charged in Count 2, and so on. Appellant did not urge that *all* of the offenses charged in Counts 13

through 24 were merged into the offense charged in Count 1 or any other single count in the group of Counts 1 through 12. Thus, the total of 20 years' imprisonment could be sustained by holding that Counts 1 and 24, for example, were separate and distinct offenses, since they related to entirely separate items of property.

CONCLUSION.

Appellant was sentenced to a term of imprisonment totalling 20 years upon conviction of 25 counts charging 25 separate and distinct offenses, for which he could have been sentenced to a term of 250 years. His motion to correct sentence was properly denied and the judgment of the District Court should be affirmed.

Dated, San Francisco, California,
July 8, 1957.

LLOYD H. BURKE,

United States Attorney,

JAMES B. SCHNAKE,

Assistant United States Attorney,

Attorneys for Appellee.

1. The first part of the paper is devoted to the study of the properties of the function $f(x)$ defined by the equation

$$f(x) = \int_0^x \frac{1}{1+t^2} dt, \quad (1)$$

where x is a real number. It is well known that this function is increasing and concave down.

2. In the second part, we shall study the function $g(x)$ defined by the equation

$$g(x) = \int_0^x \frac{t}{1+t^2} dt, \quad (2)$$

where x is a real number. It is well known that this function is increasing and concave up.

3. In the third part, we shall study the function $h(x)$ defined by the equation

$$h(x) = \int_0^x \frac{t^2}{1+t^2} dt, \quad (3)$$

where x is a real number. It is well known that this function is increasing and concave down.

4. In the fourth part, we shall study the function $k(x)$ defined by the equation

$$k(x) = \int_0^x \frac{t^3}{1+t^2} dt, \quad (4)$$

where x is a real number. It is well known that this function is increasing and concave up.

5. In the fifth part, we shall study the function $l(x)$ defined by the equation

$$l(x) = \int_0^x \frac{t^4}{1+t^2} dt, \quad (5)$$

where x is a real number. It is well known that this function is increasing and concave down.

6. In the sixth part, we shall study the function $m(x)$ defined by the equation

$$m(x) = \int_0^x \frac{t^5}{1+t^2} dt, \quad (6)$$

where x is a real number. It is well known that this function is increasing and concave up.

No. 15498

IN THE
United States Circuit Court of Appeals
For the Ninth Circuit

RAYMOND PAE, also known as
KEALOHAKALANI LIU,

Plaintiff-Appellant,

vs.

RUTH LEHUA STEVENS, SAMUEL STEVENS,
also known as BOYD STEVENS, and
KAM TAI LEE, TREASURER OF THE
TERRITORY OF HAWAII,

Defendants-Appellee.

Appeal From the Supreme Court for the
Territory of Hawaii

APPELLEE'S ANSWERING BRIEF

HERBERT Y. C. CHOY

Attorney General

Territory of Hawaii

RICHARD K. SHARPLESS

Assistant Attorney General

Territory of Hawaii

HENRY H. SHIGEKANE

Deputy Attorney General

Territory of Hawaii

Iolani Palace Grounds

Honolulu, Hawaii

Attorneys for Appellee

FILED

AUG - 3 1957

PAUL F. O'BRIEN, CLERK



SUBJECT INDEX

	Pages
JURISDICTIONAL STATEMENT	1
STATEMENT OF THE CASE.....	2
ARGUMENT.....	2
I. The court may modify the judgment of the Supreme Court of Hawaii only if it is manifestly erroneous.....	2
II. The statute governing appellant's cause of action required him to first exhaust his other remedies, and the record shows that he did not comply with this requirement	4
III. The statute governing appellant's cause of action required that he be non-negligent in suffering his loss, damage, or deprivation, and the record amply supports the finding of his negligence.....	6
CONCLUSION	10

TABLE OF AUTHORITIES CITED

CASES

	Pages
Baart v. Martin, 99 Minn. 197, 108 N.W. 945 (1906).....	6
Jones v. York County, Neb., 26 F. 2d 623 (8 Cir. 1928).....	7
McCaw v. Fase, 216 F. 2d 700 (9 Cir. 1954) cert. den. 348 U.S. 927, 75 S. Ct. 340.....	8
Pae v. Stevens, et al., 41 Haw. 490 (1956).....	1
Pioneer Mill Co. v. Victoria Ward, 158 F. 2d 122 (9 Cir. 1946), cert. den. 330 U.S. 838, 67 S. Ct. 979.....	3
Rathburn v. Kaio, 23 Haw. 541 (1916).....	7
Waialua Agricultural Co. v. Christian, 305 U.S. 91, 59 S. Ct. 21 (1938), reh. den. 305 U.S. 673, 59 S. Ct. 240.....	2
Wareham Sav. Bank v. Partridge, 317 Mass. 83, 56 N.E. 2d 867 (1944)	6

STATUTES

	Pages
Compiled Statute of Nebraska, 1922, Sec. 5720.....	7
Revised Laws of Hawaii 1915, Sec. 2993.....	7
Revised Laws of Hawaii 1915, Sec. 3227.....	7
Revised Laws of Hawaii 1935, Sec. 5099.....	3
Revised Laws of Hawaii 1945, Sec. 12699.....	3
Revised Laws of Hawaii 1945, Sec. 12612.....	8
Revised Laws of Hawaii 1945, Sec. 12614.....	9
Revised Laws of Hawaii 1955, Sec. 342-99.....	3
United States Code, Sec. 1293.....	2

No. 15498

IN THE
United States Circuit Court of Appeals
For the Ninth Circuit

RAYMOND PAE, also known as
KEALOHAKALANI LIU,

Plaintiff-Appellant,

vs.

RUTH LEHUA STEVENS, SAMUEL STEVENS,
also known as BOYD STEVENS, and
KAM TAI LEE, TREASURER OF THE
TERRITORY OF HAWAII,

Defendants-Appellee.

Appeal From the Supreme Court for the
Territory of Hawaii

APPELLEE'S ANSWERING BRIEF

JURISDICTIONAL STATEMENT

This is an appeal from the Supreme Court of the Territory of Hawaii. The proceedings originated in the Circuit Court of the First Judicial Circuit where judgment was rendered in favor of the appellee, which judgment was affirmed on appeal to the Supreme Court of the Territory of Hawaii.

Jurisdiction of this Court derives from 28 U.S.C. 1293, as this is a civil case where the value in controversy exceeds \$5,000, exclusive of interest and costs.

STATEMENT OF THE CASE

The appellee respectfully suggests that the court, in order to be certain of the accuracy of the facts, obtain them from the Stipulation entered into by the appellant and the appellee which appears on pages 25 through 36 of the Transcript of Record.

ARGUMENT

I

THE COURT MAY MODIFY THE JUDGMENT OF THE SUPREME COURT OF HAWAII ONLY IF IT IS MANIFESTLY ERRONEOUS.

The question on appeal is whether the judgment of the Supreme Court of the Territory of Hawaii is manifestly erroneous so as to require this Court to disturb that judgment. This rule, governing appeals of this nature, was set by the Supreme Court of the United States in *Waialua Agricultural Co. v. Christian*, 305 U.S. 91, 59 S. Ct. 21 (1938); rehearing denied, 305 U.S. 673, 59 S. Ct. 240; at page 109:

"It is true that under the appeal statute the lower court had complete power to reverse any ruling of the territorial court on law or fact; but we are of the opinion that this power should be exercised only in cases of manifest error. . . . In so far as the decisions of the Supreme Court of Hawaii are in

conformity with the Constitution and applicable statutes of the United States and are not manifestly erroneous in their statement or application of governing principles, they are to be accepted as stating the law of the Territory. Unless there is clear departure from ordinary legal principles, the preference of a federal court as to the correct rule of general or local law should not be imposed upon Hawaii.”

This rule has been followed by this Court in *Pioneer Mill Co. v. Victoria Ward*, 158 F. 2d 122 (9 Cir. 1946), cert. den., 330 U.S. 838, 67 S. Ct. 979.

There are no issues relating to the Constitution of the United States or to the laws of the United States. The issues are matters solely of local law, more specifically section 12699 of the Revised Laws of Hawaii 1945 (section 5099, Revised Laws of Hawaii 1935 at the time of the commencement of this suit and currently section 342-99, Revised Laws of Hawaii 1955). Section 12699 provides in part as follows:

“Actions for compensation for fraud, mistake, etc.

Any person who, without negligence on his part sustains loss or damage, or is deprived of land or of any estate or interest therein, after the original registration of land under this chapter, by the registration of any other person as owner of such land, or of any estate or interest therein, through fraud, or in consequence of any error, omission, mistake or misdescription in any certificate of title or in any entry of memorandum in the registration book, may bring and prosecute an action of contract in the circuit court for the recovery of compensation for such loss or damage or for such land or estate, or interest therein; *provided*, however, that when the person deprived of land or of any estate, or interest therein, in the manner above stated, has a right of action or other remedy for the recovery of

the land or of the estate, or interest therein, he shall exhaust the right of action or other remedy before resorting to the action of contract herein provided; . . .”

This statute was the legal basis for the cause of action that appellant instituted. It was by measuring the facts to these same provisions that the Supreme Court of the Territory of Hawaii decided that appellant was not entitled to recover compensation for the loss of his interest in parcel 1 from appellee, Kam Tai Lee, treasurer of the Territory of Hawaii. We submit that this judgment is not only not manifestly erroneous but the only proper one that that court could have rendered under the circumstances of both law and fact.

The Hawaii Supreme Court affirmed on two grounds the judgment of the trial court denying appellant recovery: First, that appellant had not exhausted his remedies or rights of action as required by section 12699, and second, that appellant was negligent and thus was, in accordance with section 12699, disqualified from obtaining compensatory relief from the appellee.

II

THE STATUTE GOVERNING APPELLANT'S CAUSE OF ACTION REQUIRED HIM TO FIRST EXHAUST HIS OTHER REMEDIES, AND THE RECORD SHOWS THAT HE DID NOT COMPLY WITH THIS REQUIREMENT.

The cause of action against the treasurer of Hawaii created by section 12699 and pursued by appellant is subject to a proviso:

“ . . . that when the person deprived of land or of any estate, or interest therein, in the manner above stated, has a right of action or other remedy for the recovery of the land or of the estate, or interest therein, he shall exhaust the right of action or other remedy before resorting to the action of contract herein provided; . . . ”

In the face of this express language the Court had no alternative but to require the appellant to first exhaust his other remedies or rights of action before it entertained the statutory action of contract. The language of this proviso is so clear that no construction is necessary; a resort to extrinsic evidence and considerations is entirely out of order in this instance.

It was stipulated between the appellant and the appellee that,

“Plaintiff (appellant) has not brought any action in any court for the purpose of cancelling or rescinding or attempting to cancel or rescind either the deed or Transfer Certificate of Title No. 21247 to Jordan Freitas and Carrie Freitas.” (Page 35 Transcript of Record)

The fact of non-action on the part of appellant having been thus established, the only other pertinent inquiry is whether there were other rights of action or remedies available to appellant.

The opinion of the Hawaii Supreme Court, announcing the judgment which is the subject of this appeal, makes clear that at least one other remedy was available:

“An infant may repudiate a deed, regardless of his negligence, and even under the holding in *Land Title, Bishop Trust, supra*, could recover the land unless the purchasers were bona fide purchasers

without knowledge of the infancy of plaintiff and the fraud perpetrated upon him. There is no showing that he might not have succeeded in repudiating the deed and recovering the land, depending upon the good faith of the purchasers." 41 Haw. 490, at 497-8.

There is nothing in evidence from which the court could have concluded that the purchasers were bona fide purchasers. In this connection it is well to bear in mind that the Freitas' bought a \$14,000 piece of land for \$5,750 or only 41 per cent of the fair market value. Appellant was not entitled to assume that the Freitas' would have raised the bona fide purchaser defense and, much less, that they would have then sustained it.

Other possible remedies for the recovering of land are (1) Before January 20, 1941, a petition to review the transfer certificate of title, on the theory that it is a decree within the meaning of section 12637 (see *Wareham Sav. Bank v. Partridge*, 317 Mass. 83, 56 N.E. 2d 867, 868 (1944); and (2) a bill in equity to set aside the transfer certificate of title, under authority of *Baart v. Martin*, 99 Minn. 197, 108 N.W. 945 (1906).

III

THE STATUTE GOVERNING APPELLANT'S CAUSE OF ACTION REQUIRED THAT HE BE NON-NEGLIGENT IN SUFFERING HIS LOSS, DAMAGE, OR DEPRIVATION, AND THE RECORD AMPLY SUPPORTS THE FINDING OF HIS NEGLIGENCE.

The cause of action instituted by appellant in this litigation is a statutory one and available, by the terms of sec-

tion 12699 which creates this cause of action, only to a "person who, without negligence on his part, sustains loss or damage, or is deprived of land or of any estate or interest therein. . . ."

Appellant contends that the contributory negligence idea in section 12699 does not refer to an infant. Appellant would have the court write into that statute an exception where none exists. Appellant cites *Rathburn v. Kaio*, 23 Haw. 541 (1916) as authority for his proposition that infants are to be excepted from the application of this portion of section 12699, that "person" does not include infants. The Rathburn case merely decided that a breach of contract by a minor was not a tortious act for which his father could be held liable under the terms of section 2993, Revised Laws of Hawaii 1915. Section 12699 of the Revised Laws of Hawaii 1945 (then section 3227, Revised Laws of Hawaii 1915) was not in issue at all. *Jones v. York County, Neb.*, 26 F. 2d 623 (8 Cir. 1928), cited by appellant, is likewise inapposite. The reason the court in the Jones case allowed the infant's cause of action was that the relevant Nebraska statute expressly provided that: "It shall not be an exception to such conclusiveness that the person is an infant, lunatic or is under any disability, but such person may have recourse upon the indemnity fund hereinafter provided for, for any loss he may suffer by reason of being so concluded." (Section 5720, Compiled Statutes of Nebraska, 1922.) There is a conspicuous absence of such a provision in the Hawaii statutes.

The trial court concluded that appellant was a "person" within the meaning of section 12699, and this conclusion

was affirmed on appeal. This is the only interpretation of the word "person", as it appears in said section, rendered by the Supreme Court of Hawaii. Interpretations of local law should be followed by this Court. *McCaw v. Fase*, 216 F. 2d 700 (9 Cir. 1954), cert. den. 348 U.S. 927, 75 S. Ct. 340.

On September 12, 1939 when appellant was practically an adult (i.e., 19 years and seven months old) he and his brother Joseph executed a general power of attorney to Ruth Lehua Stevens [Tr. of R. pp. 26, 30]. Prior thereto he and Joseph had mortgaged Parcel 1 two times; within a month thereafter they had mortgaged it a third time [Tr. of R. pp. 29, 30]. After receiving the power of attorney, Ruth Lehua Stevens did not take long to set up the Freitas sale. Fourteen days after the execution of the power of attorney, Mr. Freitas had made his first payment on account of the proposed purchase of Parcel 1, and on October 11, 1939 the parties detailed the proposed transaction in an escrow agreement. Briefly, Mr. Freitas agreed to buy, if within ninety days the land was registered in the Land Court and then properly transferred to him [Tr. of R. pp. 30, 31]. Within two weeks Ruth Lehua Stevens applied for Land Court registration of Parcel 1. Regardless of whether appellant knew about the escrow agreement, he did know about and consented to Land Court Application No. 1270 [Tr. of R. p. 31]; Land Court registration was then nothing new to appellant for he had on June 17, 1939 executed the Crozier mortgage for the express purpose of securing loans for Land Court costs and expenses [Tr. of R. p. 29]. He made no appearance in court nor checked on court proceedings in

connection with the registration of Parcel 1 [Tr. of R. p. 33].

The law requires that the "legally appointed guardian" apply for Land Court registration on behalf of an infant. (Sec. 12612, Revised Laws of Hawaii 1945.) Ruth Lehua Stevens was not the guardian of appellant. She was represented by G. D. Crozier, Esquire, in Land Court Application No. 1270. If appellant had disclosed his age, Attorney Crozier would have been required to decide whether to proceed under the authority of the power of attorney or to raise a guardian. In this connection, recall also appellant's silence when defendant Samuel Stevens told Attorney C. E. Cassidy that appellant was an adult [Tr. of R. p. 28]).

The law also required that "If the applicant shall have been known by more than one name, he shall state all his names in full." (Sec. 12614, Revised Laws of Hawaii 1945.) The application did not state that appellant had been known as Kealohakalani Lui, had been baptized Raymond Louis, or had been married under the name of Joseph Lui [Tr. of R. pp. 6, 7].

Finally, although having knowledge of Land Court Application No. 1270, appellant made no effort to see if his application had been granted or to check on the exercise of the power of attorney granted Ruth Lehua Stevens until October 8, 1940 [Tr. of R. pp. 34, 35]. It is inescapable that the Freitas' sale would not have taken place if appellant had not been extremely careless.

These facts combine to support the finding of negligence recited by the trial court and then affirmed by the Hawaii Supreme Court.

CONCLUSION

Section 12699 which governs appellant's cause of action makes compensatory relief against the treasurer of the Territory of Hawaii dependent upon the aggrieved, such as the appellant, being non-negligent in the sustaining of his loss or damage and having exhausted his other rights of action and remedies. The Supreme Court of Hawaii in adjudging the appellant not entitled to relief found him deficient in both these requirements. Either one of these two grounds, standing alone, is sufficient to uphold that judgment. We submit that under the legal and factual circumstances the Hawaii Supreme Court was right in affirming the decision of the trial court denying appellant recovery for his loss. That judgment is clearly not "manifestly erroneous" and should be affirmed.

Dated, Honolulu, Hawaii, July 26, 1957.

HERBERT Y. C. CHOY
Attorney General
Territory of Hawaii

RICHARD K. SHARPLESS
Assistant Attorney General
Territory of Hawaii

HENRY H. SHIGEKANE
Deputy Attorney General
Territory of Hawaii

Attorneys for Appellee

1

